

THE

LOCAL COURTS ACT

AND THE

COUNTY COURTS ACT

BEING

CHAPTERS 54 AND 55 OF THE REVISED STATUTES OF
ONTARIO, 1897, WITH CASES APPLYING
THERETO, AND NOTES.

BY

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PREFACE.

BY the County Courts Act, 1896, and the recent consolidation of the Rules of Practice, the jurisdiction and practice of the County Courts have been so changed that it is thought this collection of cases applying thereto may be useful.

An endeavor has been made to confine the notes, as far as possible, to matters that are not dealt with in other books on Practice. The practice of the County Courts being generally that of the High Court, it seemed unnecessary to add another to the works on that subject, and only such matters of practice are dealt with here as relate particularly to the County Courts.

Besides the Acts annotated, there are a number of other statutes that confer special jurisdiction, in a variety of matters, upon the County Courts and their Judges. To deal adequately with this additional jurisdiction, however, would require a much larger work, which would not be so generally useful as to justify its preparation.

In this attempt to collect the law relating to the County Courts, nothing has been included that did not seem to be of practical importance, and the points decided in the cases cited have been stated as concisely as possible. No doubt errors have been made, but it is hoped the work will be of benefit to those who have business in the County Courts.

Toronto, June, 1898.

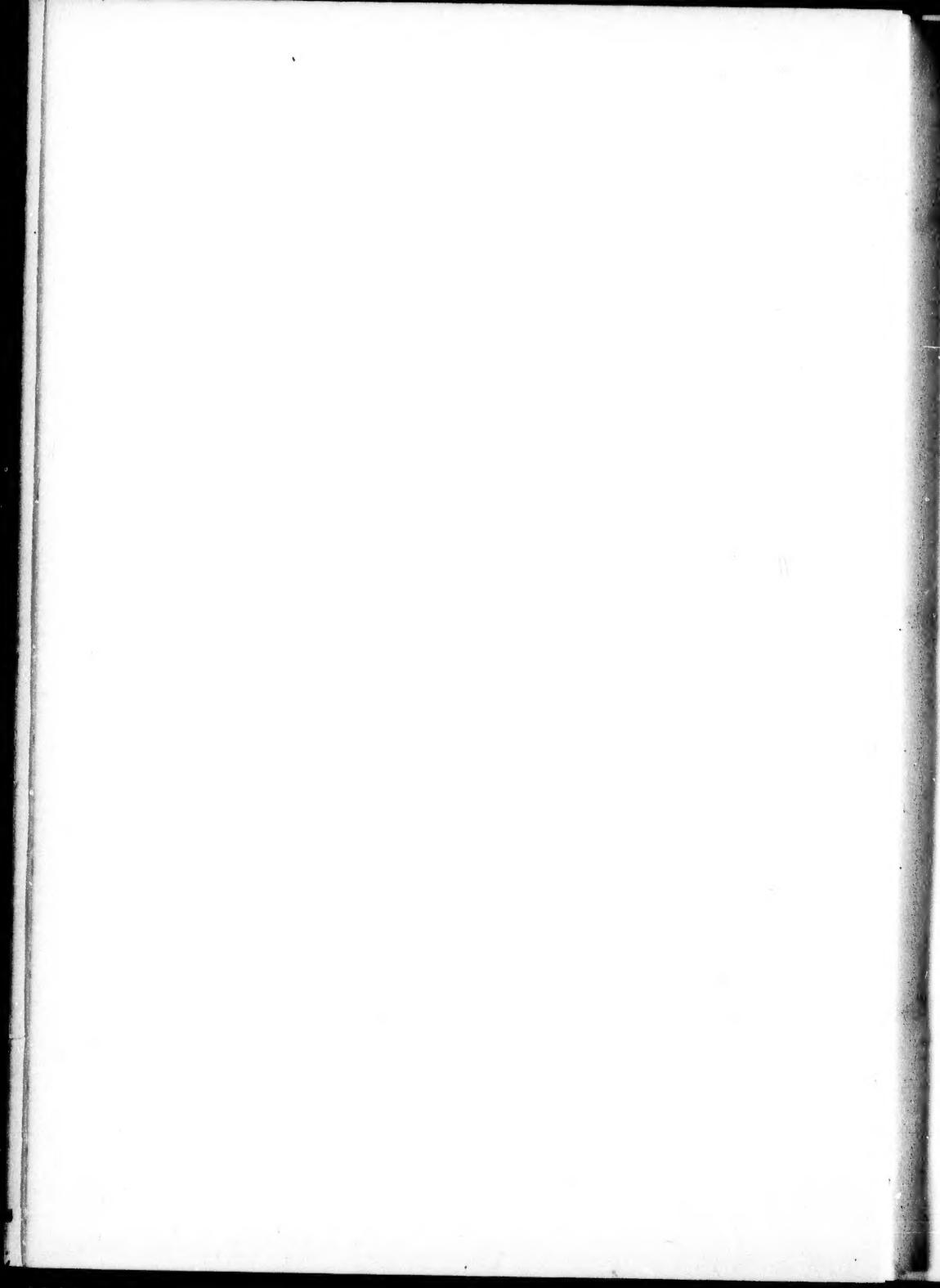


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AN ACT
RESPECTING COUNTY JUDGES
AND THE
LOCAL COURTS.

(Chapter 54 of The Revised Statutes of Ontario, 1897).

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COUNTY JUDGES AND JUNIOR JUDGES,
ss. 2-8.

DEPUTY JUDGES, ss. 9-11.

OATH OF OFFICE, s. 12.

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LOCAL COURTS OF COUNTY OF YORK,
s. 28.

HER MAJESTY, by and with the advice and consent of
the Legislative Assembly of the Province of Ontario,
enacts as follows:—

1. This Act may be cited as “The Local Courts Act.” Short title.
R. S. O. 1887, c. 46, s. 1.

JUDGES AND JUNIOR JUDGES.

2. The Judges of the several County Courts now holding office, as well as the Judges hereafter to be appointed, shall hold their offices during good behaviour, but shall be subject to be removed by the Lieutenant-Governor for inability, incapacity or misbehaviour, established to the satisfaction of the Lieutenant-Governor in Council. *Tenure of office by County Court Judges.* R. S. O. 1887, c. 46, s. 2.

By section 96 of The British North America Act, the appointment of the Judges of the County Courts is assigned to the Governor-General, and this section fixing their tenure of office has been held to be *ultra vires* of the Ontario Legislature: *Re Squire*, 46 U. C. R. 474. It was held in that case that the various Provincial Statutes assuming to repeal chapter 14 and section 3 of chapter 15 of the Consolidated Statutes of Upper Canada, and to abolish the Court of Impeachment, and to regulate the tenure of office of the County Court Judges, were not maintainable, and that the tenure of office remained as under the Consolidated Statute. These portions of the Consolidated Statutes have since been repealed by the Dominion Parliament, and R. S. C. c. 138, provides as follows:—

Section 2.—Every Judge of a County Court in any of the Provinces of Canada shall, subject to the provisions of this Act, hold office during good behaviour, and his residence within the county or union of counties for which the Court is established.

2. A Judge of a County Court may be removed from office by the Governor in Council for misbehaviour, or for incapacity, or inability to perform his duties properly, on account of old age, ill-health or any other cause; if

(a) The circumstances respecting the misbehaviour, incapacity or inability, are first inquired into; and (b) Such Judge is given reasonable notice of the time and place appointed for the inquiry, and is afforded an opportunity, by himself or his counsel, of being heard thereat, and of cross-examining the witnesses and adducing evidence on his own behalf.

3. If any such Judge is removed from office for any of such reasons, the Order in Council providing for such removal, and all reports, evidence and correspondence relating thereto, shall be laid before Parliament within the first fifteen days of the next ensuing session.

4. The Governor-General in Council may, for the purpose of making enquiry into the circumstances respecting the misbehaviour, incapacity or incapacity of such Judge, issue a commission to one or more Judges of the Supreme Court of Canada, or to any one or more Judges of any Superior Court in any Province of Canada, empowering him or them to make such inquiry, and to report; and may, by such commission, confer upon the person or persons appointed, full power to summon before him or them any person or witnesses, and to require them to give evidence on oath, orally or in writing, or on solemn affirmation, if they are persons entitled to affirm in civil matters, and to produce such documents and things as the commissioner or commissioners deem requisite to the full investigation of the matters into which they are appointed to enquire.

5. The commissioner or commissioners shall have the same power to enforce the attendance of such person or witness, and to compel him to give evidence, as is, in civil cases, vested in any Superior Court of the Province in which the inquiry is being conducted; but no such person or witness shall be compelled to answer any question, by his answer to which he would render himself liable to a criminal prosecution.

6. This section shall apply to Judges now holding office as well as to those hereafter appointed, and a Judge now holding office may be removed under this section for misbehaviour, incapacity or inability, occurring or existing before the passing of this Act.

Certain other modes of procedure for the removal of County Court Judges are pointed out in *Re Squire, supra*; as by *scire facias* when the terms and conditions of the patent have been broken.

3. The person appointed to be the Judge or Junior Judge of a County Court shall be a barrister of at least ten years' standing at the bar of Ontario. R. S. O. 1887, c. 46, s. 3; 58 V. c. 13, s. 27.

Section 97 of The British North America Act is as follows:—“Until the laws relative to property and civil rights in Ontario, Nova Scotia and New Brunswick, and the procedure of the Courts in those Provinces, are made uniform, the Judges of the Courts of those Provinces appointed by the Governor-General shall be selected from the respective Bars of those Provinces.”

4. In case more than one County Court Judge is appointed for any county, then, unless otherwise expressed in the commission, the Judge whose commission has priority of date shall be styled “the Judge of the County Court of

The Senior Judge to be styled “The Judge,” etc.

” (as the case may be), and the other Judge of the same Court shall be styled “the Junior Judge” thereof. R. S. O. 1887, c. 46, s. 4 (1).

Notwithstanding this provision, the effect of section 14 is, that wherever a statute confers any power upon the Judge of a County Court, the Junior Judge may exercise it as well as the Senior Judge. It has also been held that the term “All Judges of the County Courts,” in R. S. C. c. 142, s. 5, includes Junior Judges: *In re Parker*, O. R. 612; *In re Henry Garbutt*, 21 O. R. 465. But where an order is made in an action, referring a matter to “the Judge” of a certain County Court, only the Senior Judge can act: *Elora Agricultural Ins. Co. v. Potter*, 7 P. R. 12.

Appoint-
ment of
Junior
County
Court
Judges.

5. (1) No Junior Judge shall be appointed in or for any county or union of counties, unless the population of the county or union of counties exceeds 80,000, (but where the population exceeds 80,000 a Junior Judge may be appointed). R. S. O. c. 46, s. 4 (2); 60 V. c. 14, s. 62 (1).

No ap-
point-
ment to
vacancy
unless pop-
ulation
over
80,000.

(2) In the case of any county or union of counties in or for which there are two Judges, if one of such Judges dies or resigns his office, or is removed therefrom, there shall be no appointment of another Judge in his place unless at the time of such death, resignation or removal from office the population of such county or union of counties exceeds 80,000, and there shall thereafter be but one Judge in and for such county or union of counties until the population thereof shall exceed 80,000.

Interpre-
tation of
59 V. c.
19, s. 15.

(3) It is hereby declared and enacted that the true meaning and effect of section 15 of The County Courts Act, 1896, was that in the case of any county or union of counties for which there were at the time of the passing of that Act two Judges, if one of such Judges died or resigned, or was removed from his office, there should be no appointment of another Judge in his place unless the population of such county or union of counties at the time of such death, resignation or removal from office exceeded 80,000, and that there should be thereafter but one Judge in and for such county or union of counties, until the population thereof should exceed 80,000.

Presump-
tion as to
population

(4) If any commission issued to a junior or second Judge in and for any county or union of counties since the said The County Courts Act, 1896, was passed, stated or recited, or if any such commission hereafter issued states or recites that the population of such county or union of counties exceeds 80,000, the fact so stated shall be conclusively assumed, and shall not be controverted; and the appointment, authority or jurisdiction of the Judge appointed thereby shall not be open to question on the ground that such population did not at the time of such appointment or the issue of such commission, or at any time thereafter, exceed 80,000.

(5) This section shall not apply to any county in which Not to apply to certain counties. is situate a city, and for which county a Junior Judge was appointed prior to the 13th day of April, 1897, nor to the counties of Grey, Renfrew, Stormont, Dundas and Glengarry, Ontario, Bruce, Simcoe and Huron, nor to Victoria, including Haliburton. 60 V. c. 14, s. 62 (2-5).

The words in brackets in sub-section 1 were not contained in any former statute.

Section 15 of the County Courts Act, 1896, was repealed by 60 V. c. 14, s. 61.

6. A second Junior Judge may be appointed for the county of York, who shall be called the second Junior Judge of the county of York; he shall have the same qualifications as other Judges of County Courts; and wherever, by any statute of this Province, jurisdiction and powers are conferred, or duties and obligations imposed, upon a Junior County Judge, the like jurisdiction, powers, duties and obligations are hereby conferred on and assigned to, and may be exercised and shall be discharged by, the second Junior Judge; and all other provisions of law with respect to a Junior Judge shall apply to the second Junior Judge. 54 V. c. 15, s. 1.

7. Every County Court Judge shall reside within the county or union of counties of which his commission designates him as Judge; and there shall continue to be a resident Judge in each county or union of counties, now having a County Judge. R. S. O. 1887, c. 46, s. 5.

By R. S. C. c. 138, s. 2, the tenure of office of a County Court Judge is conditional upon his residence within the county or union of counties for which the Court is established.

As pointed out in *Re Squier*, 46 U. C. R. 474, proceedings by *scire facias* might be taken for the removal of a Judge on breach of this condition.

The last clause of this section was added when the provisions for the grouping of counties into districts, now contained in sections 19-25, were made.

8. No Judge shall, during the continuance of his appointment, directly or indirectly practice in the profession Not to practice.

Penalty. of the law as counsel, solicitor, notary public, or conveyancer or do any manner of conveyancing, or prepare any papers or documents to be used in any Court of this Province, under the penalty of forfeiture of office and the further penalty of \$400 to be recovered by any person who sues for the same in the High Court, and one-half of the pecuniary penalty shall belong to the party suing, and the other half to Her Majesty. R. S. O. 1887, c. 46, s. 6.

Where the papers leading to grant of administration had been gratuitously prepared by a County Court Judge, for use in the Surrogate Court of his county, it was held that, while the letter of this section had probably been contravened, the case was not within its spirit; the mischief against which the section is directed being the doing the acts prohibited for profit: Allen q. t. v. Jarvis, 32 U. C. R. 56.

A County Court Judge served with a subpoena to produce papers obtained by him as a solicitor, before his appointment, is not entitled to witness fees as a professional man in practice: Deadman v. Ewen, 27 U. C. R. 176.

This section does not apply to Deputy Judges: see section 11.

DEPUTY JUDGES.

A Deputy Judge may be appointed. (1) A barrister of at least three years' standing at the bar of Ontario, may be appointed to be Deputy Judge for any county.

(2) The appointment may be made notwithstanding that the office of Judge is vacant by death, or resignation, or that the Judge is ill or absent at the time of the appointment of such Deputy Judge. R. S. O. 1887, c. 46, s. 7.

The Deputy Judge is, like other Judges, appointed by the Governor-General.

Tenure of office and powers.

(10) Every Deputy Judge shall hold office during pleasure, and in case of the death, illness, or absence of the Judge, shall have authority to perform in the place of the Judge, in the county for which he is deputy, all the duties of and incident to the office of Judge of the County Court and Division Courts, and all acts required or allowed to be done by the

Judge of the County Court under this or any other statute, unless when by such statute it is otherwise expressly provided. R. S. O. 1887, c. 46, s. 8.

The Deputy Judge being the appointee of the Governor, and not of the Judge, his authority is not ended by the termination of the Judge's authority through death, removal or resignation. In *Hoey v. McFarlane*, 4 C. B. N. S. 718, the Deputy was appointed by the Judge.

The Deputy Judge may act although the Judge is not absent from the county; absence of the Judge from his official duties is all that is necessary: *Regina v. Fee*, 3 O. R. 107.

The Deputy Judge will be presumed to have properly acted as such until the contrary is shown: *Regina v. Fee, supra*; *McKenzie v. Dancey*, 12 A. R. 317.

The Deputy Judge can act only in the county for which he is appointed, and is not *ex officio* a Justice of the Peace: see section 13.

He may appoint a Deputy Judge to hold Division Courts under the Division Courts Act: *Regina v. Fee, supra*.

Further provision is also made by section 4 of the County Courts Act, for the case of the illness or absence of the Judge of a County Court.

11. No Deputy Judge shall be disabled from practising Not to be the profession of the law while holding his appointment. disabled from practising. R. S. O. 1887, c. 46, s. 9.

Where a Deputy Judge declined to entertain an application for the discharge of a defendant arrested under a *ca. re.*, on the ground that the plaintiff's solicitor was his partner, it was held that he should have granted the application: *Reid v. Drake*, 4 P. R. 141.

OATH OF JUDGES.

12. No County Court Judge, or Deputy Judge, shall enter upon the duties of his office until he has taken the following oath before some person appointed by the Lieutenant-Governor to administer the same, that is to say :

“I, _____, do swear that I will (in the case of a deputy Judge add the words, as occasion may require,) truly and faithfully, according to my skill and knowledge,

execute the several duties, powers and trusts of Judge of the County Court of the county of (or united counties of , as the case may be), and of the several Division Courts within the same, without fear, favour or malice; so help me God." R. S. O. 1887, c. 46, s. 10.

DUTIES AND POWERS OF JUDGES.

13. Every County Court Judge, not including a Deputy Judge to Judge, shall be *ex officio* a justice of the peace for every county and part of Ontario, and may act in the office of Justice of the Peace, justice of the peace in any part of the Province; and no property or other qualification shall be required in the case of a County Court Judge. R. S. O. 1887, c. 46, s. 11.

The Provincial Legislature has power, under the British North America Act, s. 92 (14), to provide for the qualification and appointment of Justices of the Peace: *Regina v. Bennett*, 1 O. R. 445; *Regina v. Lee*, 15 O. R. 353; *Regina v. Bush*, 15 O. R. 398.

14. Where any power or authority is, by this Act or by any statute now in force or which may hereafter be passed, conferred upon or is otherwise exercisable by the Senior Judge of a County Court, whether with reference to the holding of any of the Courts of the county which the said Judge may hold, or to the business of any of the said Courts, or to any other matter or thing over which the said Judge has jurisdiction, either by virtue of any statute or otherwise howsoever, the like power and authority shall be possessed by, and may be executed by the Junior Judge, subject, however, to the general regulation and supervision of the Senior Judge. R. S. O. 1887, c. 46, s. 12.

Prior to 37 V. c. 7, s. 58, the Junior Judge could not act in County Court matters except during the absence of the Senior Judge. Now the Senior and Junior Judges are invested with equal judicial power: *Re Leibes v. Ward*, 45 U. C. R. 375, at p. 381. The Senior Judge has a general supervision for the purpose of arranging for the convenient despatch of business.

In *Speers v. Speers*, 28 O. R. 188, the majority of the Court held that, under this section, a Junior Judge can hold Surrogate Court, it being one of the Courts of the county.

A Junior Judge may appoint a deputy to hold Division Courts: *Re Leibes v. Ward, supra*.

As to the powers of Junior Judges to act where authority is conferred upon the Judges of the County Courts by a statute of the Dominion Parliament, see *In re Parker*, 19 O. R. 612; *In re Henry Garbutt*, 21 O. R. 465.

15.—(1) At any sittings of the County Court at the either or same time as the sittings of the Court of General Sessions ^{both} Judges to of the Peace, or of a Division Court in any county, or of any preside in two of the said Courts at the same time, either the Senior or ^{any of the} Courts of Junior Judge or both of them, may, if the Senior Judge ^{the County} thinks fit, preside in any of the said Courts, or each of them ^{or one in} each Court ^{simul-} in one of the said Courts at the same time, so that two of the ^{taneously.} said Courts may sit and the business therein be proceeded with simultaneously. R. S. O. 1887, c. 46, s. 13.

(2) The County Court of the county of York, the Court ^{Local} ^{Courts in} of General Sessions of the Peace, and the Division Courts ^{York may} of the said county, or any three or more of the said Courts, ^{sit simul-} may sit at the same time, and the business thereof be proceeded with simultaneously, each of the said Courts so held to be presided over by one or more of the Judges of the County Court, or as the case may require. 54 V. c. 15, s. 2.

Under sub-section 1, it is only when two of the Courts are sitting at the same time that provision is made that both Judges may preside in one of them. This could be done if the other Court were held by a Deputy Judge, or the Judge of another county. The original statute, 32 V. c. 22, s. 5, was not so restricted in its application.

Section 20 of The County Courts Act, provides for concurrent sittings for the trial of jury and non-jury cases.

16. It shall be the duty of a County Court Judge to ^{Duty of} hold any of the Courts in any county other than his own, ^{Judge to} ^{act outside} or to perform any other duty of a County Court Judge in ^{his county.} any county upon being required so to do by an order of the Governor-General made at the request of the Lieutenant-Governor or, without any such order, the Judge in any

county may, if he sees fit, perform any judicial duties in any county other than his own on being requested to do so by the Judge to whom the duty for any reason belongs. R. S. O. 1887, c. 46, s. 14.

54-55 V. c. 28 (Dom.), provides as follows:

(1) The jurisdiction of every County Court Judge shall extend, and shall be deemed to have always extended, to any additional territory annexed by the Provincial Legislature to the county or district for which he was or is appointed to the same extent as if he were originally appointed for a county or district including such additional territory; Provided that nothing in this section contained shall, in any way, affect any litigation now pending, in the course of which any question has been raised as to the jurisdiction of a Judge beyond the limits of the county or district for which he was originally appointed.

(2) It shall be competent for any County Court Judge to hold any of the Courts in any county or district in the Province in which he is appointed, or to perform any other duty of a County Court Judge in any such county or district, upon being required so to do by an order of the Governor in Council, made at the request of the Lieutenant-Governor of such Province; and without any such order the Judge of any County Court may perform any judicial duties in any county or district in the Province, on being requested so to do by the County Court Judge, to whom the duty for any reason belongs; and the Judge so required or requested as aforesaid shall, while acting in pursuance of such requisition or request, be deemed to be a Judge of the County Court of the county or district in which he is so required or requested to act, and shall have all the powers of such Judge.

There has been some question as to the power of the Provincial Legislature to pass section 16, and sections 19-25, providing for the grouping of counties into districts.

In Gibson v. McDonald, 7 O. R. 401, it was held that the County Judge of Lanark had no power to preside at the Sessions in the county of Renfrew, these sections being *ultra vires*.

In Wilson v. McGuire, 2 O. R. 118, where prohibition was sought to restrain proceedings before the Judge of the County Court of Lambton, sitting in a Division Court in Middlesex, it was held, Armour, J., dissenting, that the Legislature had complete jurisdiction over the Division Courts, and, regarding these sections solely in their bearing on Division Courts, they were not *ultra vires*.

In *McKenzie v. Dancey*, 12 A. R. 317, the question was raised, but was not entertained, as there was nothing on the proceedings to show that the Judge was not the duly commissioned Judge of the Court.

In *Re County Courts of British Columbia*, 21 S. C. R. 446, the question of the power of the Legislature of the Province of British Columbia to pass a similar statute came before the Supreme Court, and the statute was held to be *intra vires* of the Provincial Legislature, independently of the Federal legislation: 54-55 V. c. 28. It was held that the power given to the Provincial Legislatures by the British North America Act, s. 92 (14), to provide for the constitution, maintenance and organization of Provincial Courts, includes the power to define the jurisdiction of such Courts territorially, as well as in other respects, and that, if the jurisdiction of the Courts is to be defined by the Provincial Legislatures, that necessarily involves the jurisdiction of the Judges who constitute such Courts.

Section 2 of the Creditors' Relief Act, R. S. O. c. 78, provides that if a Judge is disqualified to act in a matter arising under that Act, the Judge of the County Court of an adjoining county shall have jurisdiction to act in his place.

17. Any retired County Court Judge may hold any County Court or perform any other duty of a County Court Judge, Judges in any county, on being requested to do so by the Judge to whom the duty for any reason belongs, or upon being authorized so to do by an order of the Governor-General, made at the request of the Lieutenant-Governor. R. S. O. 1887, c. 46, s. 15.

54-55 V. c. 28, s. 3 (Dom.), is as follows: Any retired County Court Judge of a Province may hold any Court, or perform any other duty of a County Court Judge in any county or district of the Province, on being authorized so to do by an order of the Governor in Council, made at the request of the Lieutenant-Governor of such Province; and such retired Judge, while acting in pursuance of such order, shall be deemed to be a Judge of the county or district in which he acts, in pursuance of the order, and shall have all the powers of such Judge.

The Dominion Statute contains no provision that a retired Judge may act on the request of a County Court Judge.

In *Wilson v. McGuire*, 2 O. R. 118, it was held by Armour, J., that, not only has the Provincial Legislature no power either to appoint County Court Judges or to depute a County Court Judge to nominate another Judge to take his place, but the appointment cannot be made by the Governor-General by order, as enacted, but only by letters patent under the great seal.

Power of a
Judge so
acting.

18. In the cases mentioned in the next preceding two sections, the Judge, acting in compliance with such direction or request, shall have jurisdiction to hold all or any of the Courts of the county in which he so acts, and to do or adjudicate upon all matters or things in such county and whether relating to the business of any of the said Courts or to any other matter or thing over which the Judge of the County Court of the county has jurisdiction, either by virtue of any statute or otherwise howsoever; and no act of such Judge in any county shall be open to question in any legal proceeding on the alleged ground that he was not the proper Judge to perform the duty, or that the same had not been regularly or otherwise assigned to him, or had not been performed at such request, or by such direction, as the law requires. R. S. O. 1887, c. 46, s. 16.

The provision made in the latter part of this section is said, by Armour, J., in *Re Wilson v. McGuire*, 2 O. R. 118, to be a "device weak, as it is futile."

In *McKenzie v. Dancey*, 12 A. R. 317, an objection, that the Judge who tried the case was not properly acting as such, was not entertained, there being nothing on the proceedings to show that the case was not before the proper Judge.

COUNTY COURT DISTRICTS.

As to the power of the Legislature to pass the succeeding sections, see the cases noted under section 16. Upon the enacting of these sections County Court districts were formed in several parts of the Province, and Courts were arranged for and held, as provided by the statute. In some counties the Courts are still held at the times then fixed, but in other respects the statute is not observed. The statute does not confer authority to hear a motion in term upon a Court composed of the Judge of the County Court, in which the action is pending, and two other County Court Judges: *Ferguson v. McMartin*, 11 A. R. 731, and see *Borthwick v. Young*, 12 A. R. 671.

Grouping
counties
into
districts.

19. (1) Any part or parts of the Province may, for the purposes of this Act, be divided into districts, or groups of counties, by proclamation of the Lieutenant-Governor, at such time or times as he may deem expedient; and such division

shall take effect, and the districts thereby formed be erected and established, on such day after the first publication of the proclamation in the *Ontario Gazette* as the proclamation may name.

(2) The districts so erected may from time to time be dissolved, re-established, altered or re-arranged by the Lieutenant-Governor by like proclamation; and the time when the dissolution, alteration or re-arrangement is to take effect may be named, proclaimed and published in the *Ontario Gazette* in like manner. R. S. O. 1887, c. 46, s. 17.

20. After the erection of a district for the purposes of this Act, the several County Courts, Courts of General Sessions, Division Courts, Courts of Appeal under The Assessment Act, Courts for the Revision of Voters' Lists and all other Courts which a County Judge may hold in each county, shall be held by the Judges (including therein the Junior Judges) in the district, in rotation, as far as may in each district be just, convenient and practicable, in view of the respective ages, length of service, and strength of the several Judges, and the special duties assigned to Junior Judges, as well as in view of the other offices (if any) held by any of the Judges, and all other circumstances. R. S. O. 1887, c. 46, s. 18.

21.—(1) The Judges in any or each district so erected shall meet together at least once in every year; and the Judges present, or a majority of them, shall arrange and appoint which of the said Courts in the district shall be held by each of the Judges of the district throughout the ensuing year, and what other judicial work each shall discharge in the respective counties of the district throughout the year.

(2) The Judges may also (subject to the approval of the Lieutenant-Governor in Council, to be notified in the *Ontario Gazette*) fix and appoint the times in the months of June and December respectively in every year, for the holding of the County Courts and General Sessions of the Peace.

in every county or union of counties of such district, and the Courts shall be held on the days so appointed. R. S. O. 1887, c. 46, s. 19.

First meetings, when and where to be held.

22.—(1) The first meeting shall take place at such place and time as may be named for that purpose in the proclamation erecting and establishing a district of counties, or at the place and on the day the Judges of the district may agree upon in case the same are not named in the proclamation; and the meeting may be continued from day to day at the discretion of the Judges present.

Subse-
quent
meetings.

(2) The subsequent annual meetings shall be at such one of the county towns of the district, and at such place therein, and at such time, as the Judges of the district may unanimously agree upon, or as a majority present at the annual meeting may appoint, or as the Lieutenant-Governor by Order in Council may direct. R. S. O. 1887, c. 46, s. 20.

Duty of
the Judges

23. It shall be the duty of every Judge to whom any duty is assigned at such meeting, to perform the duty so assigned to him; and if he is, by reason of illness or other cause, unable to perform the same, it shall be his duty to do what is necessary, if he can, to have the duty performed by another person competent by law in that behalf. R. S. O. 1887, c. 46, s. 21.

Absence or
failure of
provision
made for
perform-
ance of
duties.

24. In case no provision is made at such meeting for some duty belonging to the County Court Judges, or in case the provision made in that behalf proves abortive, it shall be the duty of the Judges of the district to see that the deficiency is supplied by some other person competent by law in that behalf, and to forthwith communicate what they do therein to the Provincial Secretary. R. S. O. 1887, c. 46, s. 22.

Powers
outside his
county of
Judge of a
county
forming
part of a
District.

25. The Judge of any county, forming part of a district may, if he sees occasion, perform in any part of the district any judicial acts affecting the Courts or business of the county of which his commission designates him as Judge, and being within the legislative authority of this Province. R. S. O. 1887, c. 46, s. 23.

INTERPRETERS.

26. In case the Municipal Council of any county pass a resolution requesting or approving of the appointment of an official interpreter to act at the Courts held in that county, an appointment may be made accordingly in the same manner, and subject to the same terms and conditions, as provided in regard to shorthand writers by the next section, and the said section shall apply as nearly as may be to the official interpreters. R. S. O. 1887, c. 46, s. 24.

SHORTHAND WRITERS.

27.—(1) In case the Municipal Council of any county or the Municipal Councils of any county and a city or town united with the county for judicial purposes and not within the jurisdiction of the county council, pass a resolution or resolutions, as the case may be, requesting or approving of the appointment of a shorthand writer to and for the local Courts of the county, the Lieutenant-Governor may from time to time appoint a person to fill the office of shorthand writer for the said Courts, and such person shall be subject to the direction of the Senior Judge, or, in his absence, to the direction of the Junior Judge, and shall be entitled to such remuneration, either by salary or by fees, or partly by salary and partly by fees, as the Lieutenant-Governor in Council may from time to time direct; and if paid by salary only, the fees payable in respect of his duties as a shorthand writer shall go in reduction of his salary, and the balance, if any, shall be paid by the county quarterly, on the first day of January, April, July and October of every year.

(2) The fees, and all matters relating to the duties of the said officer shall be determined and regulated from time to time by the Judges of the said County Court, subject to the approval of the Lieutenant-Governor in Council.

(3) The city or town aforesaid, shall bear and pay the county for a proper proportion of the salary, and the proportion to be paid by the city or town to contribute to the salary.

tion, in case the city or town and county disagree, shall be determined by arbitration, according to the provisions of The Municipal Act; and, subject to such agreement or arbitration, and until and unless the same determines a different proportion, the city or town shall pay to the county one-half, and the county's share shall be one-half of said salary.

(4) This section shall not apply to the county of York.
R. S. O. 1887, c. 46. s. 25.

Shorthand
writer for
Local
Courts of
County
of York.

Remunera-
tion.

Fees and
duties.

Appor-
tionment
of salary
between
city and
county.

28.—(1) The Lieutenant-Governor may from time to time appoint a person to fill the office of shorthand writer for the local Courts of the county of York, and such person shall be subject to the direction of the Senior Judge, or, in his absence, to the direction of the Junior Judge, and shall be entitled to such remuneration, either by salary or by fees, or partly by salary and partly by fees, as the Lieutenant-Governor in Council may from time to time direct; and if paid by salary only, the fees payable in respect of his duties as a shorthand writer, shall go in reduction of his salary, and the balance, if any, shall be paid by the county quarterly, on the first day of January, April, July and October of every year.

(2) The fees, and all matters relating to the duties of said officer shall be determined and regulated from time to time by the Judges of the said County Court, subject to the approval of the Lieutenant-Governor in Council.

(3) The city of Toronto shall bear a proper proportion of the salary, and the proportion in case the city and county disagree, shall be determined by arbitration, according to the provisions of The Municipal Act; and, subject to such agreement or arbitration, and until and unless the same determines a different proportion the city shall pay to the county one-half, and the county's share shall be one-half of the salary. R. S. O. 1887, c. 46, s. 26.

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AN ACT RESPECTING COUNTY COURTS.

(Chapter 55 of The Revised Statutes of Ontario, 1897).

SHORT TITLE, s. 1.	VENUE FOR CERTAIN ACTIONS, s. 36.
STYLE OF THE COURTS, s. 2.	PLEADING AND PRACTICE, ss. 37-41.
JUDGES, ss. 3, 4.	COSTS WHERE NO JURISDICTION, s. 42.
CLERKS, ss. 5-12.	EXECUTION, ss. 43, 44.
SPECIAL EXAMINERS OF HIGH COURT TO BE OFFICERS OF COUNTY COURTS, s. 13.	POWER TO ENFORCE RULES, s. 45.
Sittings, ss. 14-21.	ACCOUNTS AND INQUIRIES, ss. 46-49.
JURISDICTION, ss. 22-29.	APPEALS, ss. 50-57.
REMOVAL OF ACTIONS INTO HIGH COURT, ss. 30-34.	RULES OF LAW, s. 58.
COSTS IN ACTIONS REMOVED, s. 35.	RULES OF COURT, s. 59.
	TARIFF OF COSTS, s. 60.

HER MAJESTY, by and with the advice and consent of
the Legislative Assembly of the Province of Ontario,
enacts as follows:—

1. This Act may be cited as "The County Courts Short title Act." R. S. O. 1887, c. 47, s. 1.
2. There shall be in every county or union of counties Existing Courts a Court of Record, to be styled the County Court of the continued. County of (or United Counties of as the case may be); and the County Courts already established under such names respectively, and all existing commissions, Judges and officers of such County Courts shall continue, subject to the provisions of this Act. R. S. O. 1887, c. 47, s. 2.

The territorial division of the Province into counties for judicial purposes is fixed by R. S. O. c. 3. Sections 3 and 4 of that Act provide that certain counties shall be united for judicial purposes.

The County Court of each county, or union of counties, is a separate and distinct Court: see *Morrison v. Corbett*, 21 N. S. R. 369.

The County Courts were first established by 34 Geo. III. c. 3, under the name of District Courts. The various provisions made from time to time, in regard to these Courts, were consolidated in 2 Geo. IV. c. 2, and again in 8 V. c. 13. The name "County Courts" was given to them by 12 V. c. 78, s. 3. For a more particular history of the legislation affecting the County Courts, see 30 C. L. J. 224.

There are County Courts somewhat similar to those of this Province in Nova Scotia, New Brunswick, Manitoba and British Columbia.

The jurisdiction of the County Courts in England is, in many ways, like that of our County Courts, but in procedure they more closely resemble the Division Courts of this Province.

JUDGES.

Judges.

3. The County Court in every county shall be presided over by the Judge or Junior or acting Judge or Deputy Judge as provided by The Local Courts Act. R. S. O. 1887, c. 47, s. 3.

See *The Local Courts Act, ante*.

Consolidated Rule 1212 provides that all writs in the County Courts shall be tested in the name of the Judge thereof; or in case of the death of such Judge, then in the name of the Junior or acting Judge for the time being.

R. S. O. c. 73, s. 30, provides that the signatures of the Judges of the County Courts shall receive judicial notice. An order signed by the Judge of a County Court is sufficiently proved by the production of a copy, certified as such under the hand of the Clerk: *Timmins v. Wright*, 45 U. C. R. 246.

4. In case of the illness or absence of the Judge of a County Court, such County Court may be presided over by a Judge of any other County Court in the Province, or by

Illness or
absence of
County
Judge.

one of Her Majesty's counsel learned in the law appointed for Upper Canada, or for the Province of Ontario, upon such Judge or counsel being requested so to act by the first-mentioned Judge. 57 V. c. 20, s. 9.

See also sections 16 and 17 of The Local Courts Act, and section 21 of this Act.

CLERKS.

5. The Lieutenant-Governor shall from time to time appoint, under the great seal, a Clerk to every County Court, to hold office during pleasure. R. S. O. 1887, c. 47, s. 4.

Lieutenant-Governor
to appoint
clerks.

The office of clerk was established as a ministerial office in a Court of Law. Before The Judicature Act, the clerks of the County Courts had, generally, the same powers and duties in the County Courts, as the deputy clerks of the Crown had in the Superior Courts of Law: 19-20 V. c. 90, s. 2. Since The Judicature Act the deputy clerks of the Crown have also had, in actions carried on in their offices, the powers and duties of a deputy registrar (not local master): see J. A. Rule 417. Although the County Courts have now jurisdiction in some equitable matters, the duties and powers of the clerk have not been expressly extended, but such matters as are of a merely ministerial nature properly belong to his office.

Section 10 provides that the clerk shall tax costs. By section 46 a reference may be made to him. Money is to be paid into Court and withdrawn with the privity of the clerk: Consolidated Rule 1221.

The examination of a judgment debtor may be had in County Court cases before the clerk: Consolidated Rule 900. There is no other provision that the clerk of a County Court may act as an examiner (but see section 176 of The Judicature Act). Under The Common Law Procedure Act, R. S. O. 1877, c. 50, s. 159, the officers who took examinations for discovery in the Superior Courts of Law, acted in the County Courts as well; and see now Consolidated Rule 443.

The clerk of a County Court has no power to settle judgments; that can be done only by the Judge.

The duties and powers of the clerk are sometimes misunderstood by reason of a too literal application of the Rules of Practice of the High Court. In applying the Rules regard is to be had to the constitution of the County Courts: Williams v. Crow, 10 A. R. 301.

Clerks to give security.

6. Every Clerk of a County Court shall give security for the due performance of the duties of his office, in such sum and with so many sureties, and in such manner and form as the Lieutenant-Governor directs. R. S. O. 1887, c. 47, s. 5.

R. S. O. c. 16, s. 9, *et seq.*, provide for security by public officers, and the time and manner of giving it, the penalty for not giving it, and the liability of sureties.

Place of office.

7. The Clerk of every County Court shall keep his office in the court house, or if there be no room therein, then in such place within the county town, as the Judge directs;

Proviso.

Provided, however, that the Clerk of the County Court of the county of Essex may keep an office in some convenient place in the City of Windsor, in the County of Essex, subject to such arrangements as the County Council of the County of Essex may assent to, and subject also to the approval thereof by the Lieutenant-Governor in Council. R. S. O. 1887, c. 47, s. 6.

By section 506 of the Municipal Act, R. S. O. 223, the County Council shall provide proper offices, together with fuel, light, stationery and furniture, for all officers connected with the Courts of Justice. The word "stationery" did not appear in R. S. O. 1887, c. 184, s. 466, but it was held that "furniture" must include everything necessary for the furnishing of the offices referred to in the enactment, for the purpose of transacting such business as might properly be done in such offices; and the word, therefore, included stationery and printed forms in use in the Courts: *Newsome v. County of Oxford*, 17 C. L. T. 173.

Office hours.

8. Subject to Rules of Court as to office hours during vacations and in Toronto on Saturdays, the office of the Clerk of the County Court, shall be kept open from 10 o'clock in the forenoon until 4 o'clock in the afternoon, except upon legal holidays or other special days appointed by an Act of the Legislature. 60 V. c. 3, s. 3; c. 14, s. 89.

Consolidated Rule 1220 is as follows: Every clerk of a County Court shall keep his office open for the transaction of business on every day except holidays, and except as hereinafter provided from the hour of 10 in the forenoon to the hour of 4 in the afternoon, and in Toronto on Saturdays from 10 in the

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forenoon till 1 in the afternoon. On and between the 1st day of July and the 31st day of August, and on and between the 24th day of December and the 6th day of January, the clerk shall keep his office open for the transaction of business from 10 in the forenoon until noon.

9. The Clerk of every County Court shall, from time to Clerk to time as often as required so to do by the county crown attorney of his county, and at least once in every three months, deliver to him, verified by the affidavit of such Clerk, sworn before the Judge or a justice of the peace of the county, a full account in writing of all fines levied by the Court. R. S. O. 1887, c. 47, s. 7.

See section 45 as to the power of the County Courts to punish by fine for contempt, etc.

R. S. O. c. 16, ss. 28 and 29, provide for making a return to Return of the Lieutenant-Governor by the Clerk of his fees and emoluments. Yearly returns of business done in his office are also required from the Clerk by the Inspector of Legal Offices, and the Bureau of Industries. Consolidated Rule 1222 requires a statement as to moneys in Court to be made every year to the Provincial Secretary and the Judges.

10. The Clerk of every County Court shall tax costs subject, in the event of a dispute arising at taxation, to an appeal to the Judge of the Court. R. S. O. 1887, c. 47, s. 8.

The clerk has not all the powers of a taxing officer of the Clerk not High Court. A distinction is constantly maintained between a "Taxing Officer" them in the tariff, many items within the discretion of the taxing officer being reserved to the discretion of the Judge in cases in the County Courts.

The practice on appeals from taxations between party and Appeals party is fixed by the following Rules:

1182. (1) A party dissatisfied with the allowance or disallowance by the taxing officer of the whole or any part of any item may, at any time before the certificate is signed, deliver to the other party interested therein and to the taxing officer objections in writing to such allowance or disallowance, specifying concisely the items objected to, and may thereupon apply to the taxing officer to review the taxation in respect of the same.

(2) The taxing officer shall hold the taxation open for a reasonable time in order to allow such objections to be delivered.

Where the clerk taxes costs for the purpose of completing a judgment and issuing execution thereon a formal certificate of

Formal taxation is not necessary, but a note at the foot of the bill, certificate, signed by the clerk, that the bill is taxed at such a sum, and when necessary, with the date of taxation, is a sufficient certificate, either as the foundation of an appeal or for the purpose of issuing execution: *Cuerrier v. White*, 12 P. R. 571; *McCallum v. McCallum*, 11 P. R. 179: see also Form 139 appended to the Consolidated Rules. Where the certificate is in the nature of a report, as in solicitor and client taxations, a formal certificate is necessary: *Largtry v. Dumoulin*, 10 P. R. 444; *Gall v. Collins*, 12 P. R. 413.

1183. Upon the application the taxing officer shall reconsider and review his taxation upon such objections, and he may receive further evidence in respect thereof, and, if required, he shall state either in his certificate of taxation or by reference to such objections, the grounds and reasons of his decision thereon, and any special facts or circumstances relating thereto.

774. In cases to which Rule 773 does not apply, a party dissatisfied with the certificate of a taxing officer may apply to a Judge in Chambers to review the taxation as to any item or part of an item, which has been objected to as provided by Rules 1182 and 1183; but the certificate of the taxing officer shall be final and conclusive as to all matters which have not been objected to in manner aforesaid.

775. No appeal under Rule 774 shall lie unless a notice thereof is given within four days from the day of the date of the certificate, and the appeal brought on for argument within ten days from the said day.

776. The appeal shall be heard by the Judge upon the evidence which was brought in before the taxing officer, unless otherwise ordered.

No appeal from Judge of the County Court upon appeal from the clerk's certificate: *Routledge v. Graham*, Divisional Court, 14th September, 1897.

By R. S. O. c. 174, s. 35, a Judge of a County Court may make an order for the taxation of a solicitor's bill; and where no bill has been delivered he may, under section 42, order the delivery of a bill: *In re Solicitor*, 7 C. L. T. 297.

Appeals from solicitor and client taxations are provided for by Rule 773: "An appeal from the report or certificate of an officer to whom the taxation of (a) solicitor's bill under Rules 1181 to 1188 inclusive has been referred shall lie and may be brought in the same manner as in the case of the report of a Master."

As to appeals from the report of a Master in an action in a County Court, see sections 48 and 49 of this Act.

Provision is also made by various statutes for the taxation of costs in some special matters by the clerks of the County Courts; as mortgagees' costs by R. S. O. c. 121, s. 32; costs awarded upon an arbitration under The Municipal Act, see R. S. O. c. 223, s. 460, and see section 462 as to taxation of arbitrators' fees; costs awarded under The Municipal Drainage Act, R. S. O. c. 226, s. 106; see also R. S. O. c. 75, s. 19, as to the revision by the clerk of the County Court of the taxation by the Division Court clerk of costs of distress.

Where the costs, in a matter not in Court, are awarded by Appeals statute and not by the Court, and are referred by the statute to the clerk of a County Court for taxation, the clerk acts, not as ^{where} ^{Clerk acts} an officer of the Court, but as a person designated by statute, ^{as persona designata,} and the Court has no jurisdiction to review his taxation: Sandback Charity Trustees v. North Staffordshire R. W. Co., 3 Q. B. D. 1; Owen v. London & North-Western R. W. Co., L. R. 3 Q. B. 54; In re Sheffield Waterworks Act, Collis's Claim, L. R. 1 Ex. 54; Mahon v. Nicholls, 31 U. C. C. P. 22, at p. 28.

But, if the costs are payable by virtue of an order of the Court, the taxation is subject to the usual appeal: Crooks v. Township of Ellice, 16 P. R. 553.

11. No Clerk of a County Court shall, for fee or reward draw or advise upon a chattel mortgage or other paper or document connected with the duties of his office and for which a fee is not expressly allowed by the tariff in that behalf. R. S. O. 1887, c. 47, s. 9.

By R. S. O. c. 174, s. 30, a solicitor is prohibited from practising while he holds the office of clerk of a County Court. Not to practice as solicitor.

Consolidated Rule 1179 provides that the fees and disbursements payable upon proceedings in the County Courts shall be those enumerated in Tariff B. appended to the Rules. The following note appears at the end of that tariff: "In all applications and proceedings before the County Court Judges not relating to suits instituted in any Court of civil jurisdiction there shall be payable to the clerks of the County Courts the same fees as in this table so far as the same are applicable.

See also R. S. O. c. 76, s. 3.

12.—(1) In the event of the death, resignation or removal of the Clerk of a County Court, the Clerk of the Peace for the County shall, *ex officio*, be Clerk of the County ^{to act pro tem. in}

case of the Court until another person is appointed and assumes the death, etc., of the County Court Clerk.

Proviso. of the County Court Clerk. of the County Court as aforesaid shall, except in the County of York, be also *ex officio* Deputy Clerk of the Crown and Registrar of the Surrogate Court, or in case the said Clerk of the County Court was Local Registrar, the said Clerk of the Peace shall, while he holds the said office, be *ex officio* Local Registrar; Provided, however, that this enactment as to the Clerk of the Peace being *ex officio* Registrar of the Surrogate Court, shall not apply to any case where at the time of the death, resignation or removal of the Clerk of the County Court, he did not hold the office of Registrar of the Surrogate Court. R. S. O. 1887, c. 47, s. 10 (1); 60 V. c. 15, Sched. A (12).

(2) The Clerk of the Peace shall add the words *pro tem.* when affixing his official designation as Clerk of the County Court, Deputy Clerk of the Crown, Local Registrar or Registrar of the Surrogate Court to his signature in any writs, rules, grants or orders, signed by him under the provisions of this section. R. S. O. 1887, c. 47, s. 10 (2).

R. S. O. c. 51, s. 143, provides when the clerk of the County Court shall be deputy clerk of the Crown, deputy registrar or local registrar; R. S. O. c. 59, ss. 9 and 10, provide when he shall be registrar of the Surrogate Court.

SPECIAL EXAMINERS.

13. All special examiners of the High Court heretofore or hereafter appointed, shall be officers of the several County Courts of the Province and shall possess like powers in County Court cases, as those now possessed and exercised by them in cases in the High Court. R. S. O. 1887, c. 47, s. 11.

Section 172 of the Judicature Act, R. S. O. c. 51, contains the following: "(1) The Supreme Court may, from time to time, under the seal of the Court appoint, and at discretion remove, special examiners for the purpose of taking evidence of parties and witnesses, and the examiners so appointed shall have all the powers possessed by masters extraordinary and examiners."

An examination for discovery may also be had before a local Other registrar, local master, or deputy clerk of the Crown as pro-officers who may vided by Consolidated Rule 443, or before any other person by take ex-order under Consolidated Rule 444. As to the examination of animations judgment debtors, see Consolidated Rule 900. Apparently any of the officers named may act in County Court as well as in High Court cases.

Except in Rule 900 it has never been provided that the clerk of a County Court may act as an examiner (see, however, section 176 of The Judicature Act); in practice examinations are commonly taken by many clerks not only in actions in their own Courts but in actions in other County Courts.

SITTINGS.

14.—(1) In lieu of terms, the several County Courts shall in each year hold four quarterly sittings, which (except in the county of York), shall commence respectively on the second Monday in the month of January and the first Monday in the months of April, July and October in each year, and end on the Saturday of the same week, unless extended by order of the Judge.

(2) The said quarterly sittings of the County Court of the county of York shall commence on the second Monday in January, June and October, and the first Monday in April in each year; and shall end on the Saturday of the same week, unless extended by order of the Judge.

(3) It shall not be necessary for the sheriff or his officers to attend the said quarterly sittings of the County Court. R. S. O. 1887, c. 47, s. 12.

Consolidated Rule 1214 is as follows: "Subject to Rules of Court may Court the Judges of the County Courts shall have power to sit at any time and act at any time for the transaction of any part of the business of such Courts, or for the discharge of any duty which by any statute or otherwise was formerly required to be discharged out of or during term."

Motions under section 51 of this Act form the chief business before the County Courts at these quarterly sittings.

Trial sittings of County Courts.

15. Except in the county of York, and subject to the provisions of section 21 of the Local Courts Act, sittings of the said County Courts, for the trial of issues of fact and assessment of damages, shall be held semi-annually, to commence on the second Tuesday in the months of June and December in each year. R. S. O. 1887, c. 47, s. 13 (1).

The sittings held under this section are for the trial of both jury and non-jury cases.

Under section 21 of The Local Courts Act times were fixed for holding the Courts in a number of counties grouped into districts under that Act, and, in some of these counties, the times so fixed are still retained.

By R. S. O. c. 59, s. 22, questions of fact arising in a proceeding in a Surrogate Court, and ordered to be tried by a jury, shall be tried at the sittings of the County Court for the county.

By R. S. O. c. 56, s. 4, the sittings of the Courts of General Sessions of the Peace are fixed for the same times as the sittings of the County Courts under this and the following section.

The two Courts may be proceeded with simultaneously: see section 15 of The Local Courts Act.

In County of York.

16. The County Court of the county of York shall hold four such sittings in each year, to commence respectively on the first Tuesday in the months of December and March, and on the second Tuesday in the months of May and September in each year. R. S. O. 1887, c. 47, s. 13 (2).

Entry of non-jury cases.

Actions to be tried without a jury in this Court are entered for trial under Consolidated Rule 538, as in other County Courts. Consolidated Rule 542 does not apply.

County Court sittings without a jury in April and October.

17. Except in the county of York, there shall be sittings of the several County Courts of this Province on the first Tuesday in the months of April and October in each year, whereat all issues of fact in any civil action brought or pending in the Court wherein the sittings may be, and every assessment and inquiry of damages in such action may be heard, tried and assessed by the Judge of such Court without the intervention of a jury, in those cases where no jury is required. R. S. O. 1887, c. 47, s. 14.

Under section 19 additional sittings may be held for the trial of actions without a jury.

18. The sittings of the County Courts for the trial of ^{Sittings on} jury and non-jury cases shall not open earlier than one of ^{first day to commence} the clock in the afternoon on the first day of the sittings, ^{at one o'clock} but this shall not prevent a non-jury trial being begun before one of the clock with the consent of the parties. ⁵⁷ ^{in the afternoon.} V. c. 20, s. 12.

19. In addition to the regular sittings of the several ^{Power to hold additional sittings.} County Courts, the Judge of every County Court may, at such times as he appoints for the purpose, hold additional sittings of such Court for the trial of issues of fact to be tried in such Court by a Judge without a jury; and he shall hold such sittings as often as may be requisite for the due despatch of business. R. S. O. 1887, c. 47, s. 15.

Sittings are commonly held under this section. The County Court of the county of York holds three special sittings each year, commencing on the first Monday in February, the second Monday in April and the third Monday in October.

20. While sittings of the County Court of any county which has a Senior and Junior Judge, are being held for the trial of issues of fact and assessment of damages, the Judges of the said Court, or any two persons authorized to hold the sittings of such Court, may, in case the General Sessions of the Peace have been adjourned or have terminated, sit separately, one for the trial of causes where a jury is required, and the other for the trial of causes to be tried without a jury. R. S. O. 1887, c. 47, s. 16.

21.—(1) Where, from illness or from other casualty, the Judge who is to hold the Sittings of the County Court is unable to hold the same at the time appointed therefor, the sheriff of the county, or in his absence his deputy, ^{may adjourn the said Court to any hour on etc.} owing to illness of Judge, adjourn by his proclamation the said Court to any hour on the following day, to be by him named, and so from day to day until the Judge is able to hold such Court, or until he receives other directions from the Judge or Provincial Secretary.

Provincial
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to be
notified.

(2) The sheriff shall forthwith notify any adjournment to the Provincial Secretary, for the information of the Lieutenant-Governor. R. S. O. 1887, c. 47, s. 17.

Another person may be appointed to hold the Court under section 4 of this Act or sections 9, 16 or 17 of The Local Courts Act.

JURISDICTION.

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ction.

The County Courts are Inferior Courts of Record: see section 2; Bullen v. Moodie, 13 U. C. C. P. 126 at p. 138. By 8 V. c. 13, they were declared to be Courts of Law. Jurisdiction over certain equitable causes of action was granted them by 16 V. c. 119, but was withdrawn by 32 V. c. 6, s. 4. By 36 V. c. 8, s. 2, it was provided that any person having a purely money demand might proceed to recover it by action at law although the right to recover might be an equitable one only, and, in Reddick v. Traders Bank of Canada, 22 O. R. 449, Meredith, J., held that enactment to be still in force so far as it conferred jurisdiction upon the County Courts, although, as to the High Court, it was superseded by The Judicature Act. In Hutson v. Valliers, 19 A. R. 154; Whidden v. Jackson, 18 A. R. 439, and Re McGugan v. McGugan, 21 O. R. 289, it was held, however, that the County Courts had no original equitable jurisdiction.

Since these decisions The County Courts Act, 1896, has been passed and its provisions are incorporated in this Act. Section 28 now provides that the County Courts shall have legal and equitable jurisdiction. The Legislature has thereby made a general extension of the jurisdiction of the County Courts, so that the matters, of which it elsewhere provides they may have cognizance, will be equally within the jurisdiction, whether they are of an equitable or a legal nature.

By some of the clauses of section 23 jurisdiction is conferred in actions of a purely equitable nature.

Also see section 28 as to the nature of the relief that may be granted by the County Courts in actions within their jurisdiction, and see that section and section 29 as to equitable defences and counter-claims. By section 58 the rules of law enacted and declared by the Judicature Act shall apply to the County Courts so far as the matters to which such rules relate shall be cognizable by such Courts.

The juris-
diction is
special.

The jurisdiction exercised by an inferior Court is a special jurisdiction, conferred and limited by statute, and if the conditions precedent to its exercise do not exist the whole proceeding

is coram non judice. Serjeant v. Dale, 2 Q. B. D. 558, at p. 566; Re Cosmopolitan Life Association, 15 P. R. 185.

In an action in an inferior Court the plaintiff must, in the statement of his claim, allege all facts upon which the jurisdiction of the Court depends. He must show that the cause of action is within the jurisdiction: Mayor of London v. Cox, L. R. 2 H. L. 239; 36 L. J. Ex. 225; Trevor v. Wall, 1 T. R. 151; The Queen v. Mayor of London, 13 Q. B. 1, at p. 29; 16 L. J. Q. B. 185; Read v. Pope, 1 C. M. & R. 302. It is necessary that every part of that which is the gist and substance of the action should appear to be within the jurisdiction: Peacock v. Bell, 1 Wms. Saund. 73. If the declaration does not allege the matter to be within the jurisdiction, prohibition lies at any time. Comyns's Dig. Tit. Courts (P. 9) & (P. 15). So in New Brunswick it has been held that the declaration in a replevin action in a County Court must allege the goods to be of the value of not more than \$200: Morice v. Forster, 25 N. B. R. 1. This rule has been held not to apply to the statement of the plaintiff's claim endorsed upon the writ of summons: Cheesewright v. Thorn, 38 L. J. Ch. 615; Dunlap v. Babang, 27 N. B. R. 549; but the exception probably does not extend to special endorsements, upon which the Court may be asked to give judgment. In practice the rule appears to have been always very generally neglected in Ontario. In Jordan v. Marr, 4 U. C. R. 53, where the County Court had tried the case, and it appeared by the evidence that the claim was one within the jurisdiction, the objection, raised on appeal, that the declaration did not show a cause of action within the jurisdiction, was overruled, the majority of the Court holding it to be sufficient that the case is one that may be within the jurisdiction: See also Davidson v. The Belleville and North Hastings R. W. Co. 5 A. R. 315.

Where a plaintiff sues upon a judgment obtained in an inferior Court, or where a defendant pleads that he has already been sued upon the same cause of action in an inferior Court, when judgment was given in his favour, nothing will be assumed in favour of the jurisdiction of the inferior Court that is not expressly pleaded: Mayor of London v. Cox, *supra*; Briscoe v. Stephens, 2 Bing. 213; Read v. Pope, *supra*; Peacock v. Bell, *supra*; Bullen v. Moodie, 13 U. C. C. P. 126.

The jurisdiction conferred upon the County Courts by the succeeding sections is limited in point of amount and locality. Each County Court is a separate Court, having a district of its own within which its authority and that of its Judge is confined unless specially extended by Statute to other parts of the

Province: see *Morrison v. Corbett*, 21 N. S. R. 369. The Statute 34 Geo. III. c. 3, establishing District Courts in this Province, gave them no jurisdiction beyond their respective districts. By 19-20 V. c. 90, s. 5, it was provided that when the cause of action was transitory and within the County Court jurisdiction, a plaintiff might issue his writ in any County Court, and now Consolidated Rule 121 provides that the writ of summons may be issued in any county: and see *Mahon v. Nicholls*, 31 U. C. C. P. 22. By an earlier Statute, 13-14 V. c. 52, ss. 2 and 3, if the action had been brought in the proper County Court, service of the writ and other proceedings might be made, and writs of subpoena and execution, Judges' orders, etc., might be served and executed in any county: see now Consolidated Rules 146 and 327 and sections 41 and 44 of this Act. By 19-20 V. c. 90, s. 2, the County Courts were given power to issue writs for service out of Upper Canada: see now Consolidated Rule 162. In regard to certain causes of action, however, jurisdiction is conferred only upon the County Court of a particular county and the writ must be issued there: see section 23, clauses 5, 6, 8, 9 and 10, and section 27.

Limit in point of amount.

The limits in point of amount, beyond which there is no jurisdiction, are fixed by the various sections giving jurisdiction and by section 22. When the District (now County) Courts were established there were excluded from their jurisdiction suits for small sums collectable in the Courts of Requests, but in the Consolidating Statute, 8 V. c. 13, this limitation was dropped, and now the only objection that can be raised by reason of the smallness of the amount involved is in regard to costs: see Consolidated Rules 1132 and 1133.

Joining causes of action.

By 19-20 V. c. 90, s. 9, a plaintiff was permitted to join several causes of action in one suit in a County Court, except in replevin and ejectment, and it is stated by Jones, J., in *Jordan v. Marr*, 4 U. C. R. 53, that the combining of several demands in one action had been permitted ever since 2 Geo. IV. c. 2. Consolidated Rule 232 now provides that, subject to Rules 233-237, the plaintiff may unite, in the same action, several causes of action. But in an action in respect of several unliquidated claims no more than \$200 in all can be recovered; and, where liquidated and unliquidated claims are combined, no greater sum than \$200 can be recovered in respect of the unliquidated claims and no more than \$600 in all: *Jordan v. Marr*, 4 U. C. R. 53; *Vogt v. Boyle*, 8 P. R. 249; *McLaughlin v. Schaefer*, 13 A. R. 253.

Splitting causes of action.

There is no statute providing that a cause of action shall not be split to give jurisdiction to a County Court, and there are

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conflicting decisions as to what the rule of law is on the matter is, where there is no statutory provision. It has been said that if there be several contracts between A. and B. at several times for divers sums, each within the jurisdiction of an inferior Court, but they all amount to a sum beyond the jurisdiction of the inferior Court, they must be sued in the Superior Court: *1 Ventr. 65*. But in *Rex v. The Sheriff of Herefordshire*, 1 B. & Ad. 672, it was held that the rule as to splitting a cause of action applied only where the cause of action was one and entire. In that case prohibition was sought in respect of two actions by a carrier for the carriage of goods, and it was held that, as he might have sued for the first claim in the County Court when the debt was incurred, the subsequent accrual of another claim did not deprive him of that right: See also *Kimpton v. Willey*, 9 C. B. 719; 19 L. J. C. P. 268; *In re McKenzie and Ryan*, 6 P. R. 323; and *Ex parte Lynott*, 26 N. B. R. 126, where the matter is discussed at length.

Where there has been an improper splitting of a cause of action the defendant's remedy is prohibition. He cannot raise the objection as a substantive defence in another action by the plaintiff for the balance: *Public School Trustees of Nottawasaga v. Township of Nottawasaga*, 15 A. R. 310.

If the plaintiff's cause of action is beyond the jurisdiction, Abandon he may abandon the excess before action: *In re McKenzie v. Ryan*, 6 P. R. 323; *Jarvis v. Leggatt*, 10 C. L. T. 155; or at any time before or during the trial. See section 26, *post*.

If the plaintiff's claim is within the jurisdiction an assessment of the damages, by the jury, at an amount beyond it does not oust the jurisdiction, but the excess may be remitted: *Thomas v. Hilmer*, 4 U. C. R. 527.

The parties cannot, by consent or acquiescence give the Court a jurisdiction it does not by law possess: *Re Knowles v. Holden*, 24 L. J. Ex. 223; *Farquharson v. Morgan*, (1894) 1 Q. B. 552; 70 L. T. N. S. 152. But the right to prohibition may be lost by not making proper objection: see *post*.

Where the Court has no jurisdiction over the subject-matter of the action, the defendant does not by appearing and taking a step in the cause, waive his right to object to the jurisdiction: *Mayor of London v. Cox*, L. R. 2 H. L. 239, 36 L. J. Ex. 225; *In re Cleghorn v. Munn*, 2 C. L. J. 133; *Lee v. Cohen*, 71 L. T. N. S. 824; *Moore v. Gamgee*, 25 Q. B. D. 244. But where there is merely a want of jurisdiction over the particular defendant, as where he resides beyond the limits of the Court's jurisdiction,

the objection is waived by his appearing and defending: *Graham v. Smart*, 18 U. C. R. 482; *Moore v. Gamgee, supra*; *In re Jones v. James*, 19 L. J. Q. B. 257.

The parties may admit the facts which give the Court jurisdiction; and where an order has been made by consent and proceedings are taken to enforce it, a party is not entitled to bring proof of facts to show that the order was made without jurisdiction: *The River Ribble Joint Committee v. The Croston Urban District Council*, 45 W. R. 348; (1897) 1 Q. B. 251.

Where a party takes a benefit under an order he cannot afterwards object that it was made without jurisdiction: *Tinkler v. Hilder*, 4 Ex. 187; *Richardson v. Shaw*, 6 P. R. 296.

Where, notwithstanding the want of jurisdiction, the parties have consented that the Judge may dispose of the matter, he is an arbitrator, and his decision is an award and is not appealable: *Hutson v. Valliers*, 19 A. R. 154; *Harrison v. Wright*, 13 M. & W. 816; *Stevens v. Phelps*, W. N. (1875) 89; *In re Solomon*, W. N. (1878) 150; *McColl v. Waddell*, 19 U. C. C. P. 213.

Judge can
not give
himself
jurisdiction
by a
wrong
decision.

An inferior Court cannot give itself jurisdiction by a wrong decision on a point on which its jurisdiction depends: *Bunbury v. Fuller*, 9 Ex. 111, at p. 140. But the decision of the Judge of a County Court as to a fact upon which his jurisdiction depends is conclusive where he decides upon conflicting evidence: *Feehan v. Nowall*, 17 L. J. Q. B. 161; *Brown v. Cocking*, L. R. 3 Q. B. 672. At least his decision in such a case will be interfered with only upon strong grounds: *In re Long Point Co. v. Anderson*, 18 A. R. 401; *In re Chisholm and Corporation of Oakville*, 12 A. R. 225; *Joseph v. Henry*, 19 L. J. Q. B. 369; *Re Western Fair Association v. Hutchinson*, 12 P. R. 40; *In re Clarke*, 2 Q. B. at p. 633; *Re Bushell v. Moss*, 11 P. R. 251. The Judge's decision on uncontradicted facts is open to review: *Re Macfie v. Hutchinson*, 12 P. R. 167; *Stephens v. Laplante*, 8 P. R. 52. The Judge cannot give himself jurisdiction by deciding without evidence, nor can he refuse to go into evidence to see whether he has jurisdiction or not: *Brown v. Cocking, supra*; *In re McKenzie v. Ryan*, 6 P. R. 323; *Re Moberly v. Town of Collingwood*, 25 O. R. 625. The decision of the Judge on a point of law, (as the construction of a statute or a document), upon which his jurisdiction depends may be reviewed: *Elston v. Rose*, L. R. 4 Q. B. 4; *In re Long Point Co. v. Anderson, supra*. Where the County Court Judge has decided at the trial that he has no jurisdiction he can nevertheless entertain a motion for a new trial: *Lister v. Wood*, 23 Q. B. D. 229.

Where
there is no a
claim over

Where it appears that an action in an inferior Court is upon a claim over which it has no jurisdiction, or involves a question

that the Court cannot try, no further proceedings can be taken jurisdiction no
in the action in the inferior Court: *Taylor v. Addyman*, 13 C. B. further
309. The plaintiff cannot discontinue, as that is taking a step in proceed-
the cause: *Hodgson v. Graham*, 26 U. C. R. 127. If the cause of ings can
action is one in regard to which jurisdiction is given only to Plaintiff be taken.
some particular County Court, as in replevin, and the action is cannot dis-
brought in the wrong County Court, the venue cannot be changed continue.
to the proper county: *Howard v. Herrington*, 20 A. R. 175. The cannot be
action may, however, be transferred to the High Court: see Action
sections 24, 30 and 32, *post*. A claim may also, at any time be- may be
fore or during the trial, be brought within the jurisdiction by removed
abandonment under section 26. to High
Court.

Where a County Court is proceeding in a matter beyond its Prohi-
bition jurisdiction it may be restrained by prohibition. It has always bition.
been the policy of the law, as a question of public order, to keep
inferior Courts strictly within their proper sphere of jurisdiction:
Farquharson v. Morgan, (1894) 1 Q. B. 552, 70 L. T. N. S. 152.
For this purpose the Superior Courts have a general power to
restrain the exercise, by inferior Courts, of jurisdiction not
authorized by proper authority: *Mayor of London v. Cox*, L. R. 2
H. L. 239, 36 L. J. Ex. 225; *Worthington v. Jeffries*, L. R. 10 C.
P. 379.

An inferior Court may be restrained by prohibition from ex-
ceeding its jurisdiction under any special Act: *Hull v. McFarlane*,
2 C. B. N. S. 796, 27 L. J. C. P. 41. But where the Judge of a
County Court is acting in a matter in which no judgment or
order imposing any legal obligation or duty on any individual
can be pronounced, he is not subject to control by prohibition: *In
re Godson and The City of Toronto*, 16 A. R. 452; affirmed,
18 S. C. R. 36; *In re Alexander Boyes*, 13 O. R. 3, it was doubted
whether the High Court could grant prohibition to interfere with a
County Court Judge acting as an election officer: see *McLeod v.
Noble*, 24 A. R. 459; *McLeod v. Noble*, 28 O. R. 528; see also *Re
New Par Consols (Lim.)*, 42 Sol. Jur. 343.

Where there is no want of jurisdiction prohibition will not There
be granted merely because the judgment is wrong: *In re Long* must be
Point Co. v. Anderson, 18 A. R. 401; *Bland v. Andrews*, 45 U. C. absence of
R. 431; *Re The Grosvenor & West End R. W. Terminus Hotel Co.* jurisdiction.
76 L. T. N. S. 337, at p. 339; nor for mere irregularity in a matter
of practice: *Fee v. McIlhargey*, 9 P. R. 329; *Hooper v. Hill*, (1894)
1 Q. B. 659; 63 L. J. Q. B. 598; *Regina v. London (Mayor) and
Stock*, 62 L. J. Q. B. 589; 69 L. T. N. S. 721; *In re Clarke*, 2 C.
L. J. 266; *Re McLean v. McLeod*, 5 P. R. 467; *Jenkins v. The
Central Ontario R. W. Co.*, 4 O. R. 593; nor for the refusal of

evidence: *Re Reid v. Graham*, 25 O. R. 573. But where, in an action within his jurisdiction, the Judge of a County Court made an order for the trial of an interpleader issue in a case not authorized by the rules respecting interpleader, prohibition was granted on the application of the parties brought in: *Re Gould v. Hope*, 20 A. R. 347; and prohibition may be granted although there is jurisdiction, if there is a denial of right: *Mayor of London v. Cox, supra*.

Prohibition will not be granted merely because the inferior Court refuses to try the question of jurisdiction, if the fact is that there is jurisdiction: *In re Thompson v. Hay*, 20 A. R. 379. Unless it appears that in no view of the facts has the County Court jurisdiction, prohibition will not be ordered: *Re McKenzie v. Ryan*, 6 P. R. 323; *Fleming v. Livingstone*, 6 P. R. 63; *In re Dixon v. Snarr*, 6 P. R. 336. Prohibition will not be ordered where the particular matter over which there is no jurisdiction is not material to the question before the Court: *Morton v. Grand Junction Canal Company*, 6 W. R. 543; *Re Knight v. Medora and Wood*, 14 A. R. 112; *In re Municipality of South Norfolk v. Warren*, 12 C. L. T. 512. A matter arising incidentally in the course of the action, which the Court has no jurisdiction to try, does not afford ground for a prohibition unless the Court is proceeding to adjudicate thereon: *Dutens v. Robson*, 1 H. Bla. 100; *In re Emery and Barnett*, 4 C. B. N. S. 423; *Eversfield v. Newman*, 4 C. B. N. S. 418. Where the claim is made up of several distinct causes of action in regard

Partial prohibition may be ordered. to some of which there is jurisdiction, partial prohibition may be granted, confined to those matters over which there is no jurisdiction: *In re Kerkin v. Kerkin*, 3 E. & B. 399; *In re Walsh v. Ionides*, 1 E. & B. 383; *Trimble v. Miller*, 22 O. R. 500; *Re Elliott v. Biette*, 21 O. R. 595.

Not granted if an appeal may be had. If relief may be had by an appeal, prohibition will not be ordered: *Van Norman v. Grant*, 27 Gr. 498; *Barker v. Palmer*, 8 Q. B. D. 9; but prohibition will not be ordered merely because there is no appeal: *Regina v. London (Mayor) and Stock*, 62 L. J. Q. B. 589; 69 L. T. N. S. 721.

Time for applying. Where the claim of the plaintiff is beyond the jurisdiction, prohibition may be applied for at once without waiting until the Court has proceeded to hear the matter: *Mayor of London v. Cox, supra*; *Re Summerfeldt v. Worts*, 12 O. R. 48; and, if the excess of jurisdiction does not appear on the face of the proceedings, it may be proved by affidavit, *Ibid.*; *Jacobs v. Brett*, L. R. 20 Eq. 1; *Sewell v. Jones*, 1 L. M. & P. 525, 19 L. J. Q. B. 372.

Where jurisdiction is ousted. Where the subject-matter of the action is within the jurisdiction, no prohibition can be awarded until a defence is set up on some ground raising an issue that the Court is incompetent

to try: *Mayor of London v. Cox*, L. R. 2 H. L. 239, at p. 293; during *Seabrook v. Young*, 14 A. R. 97; but see *Sewell v. Jones*, 1 L. M. ^{progress} of action. & P. 525, 19 L. J. Q. B. 372.

If the question of jurisdiction depends upon disputed facts prohibition will not be ordered until the Judge of the County Court has decided the facts involving the question of jurisdiction: *In re Dixon v. Snarr*, 6 P. R. 336; but see *Symons v. Rees*, 1 Ex. D. 416.

Where the absence of jurisdiction is not apparent on the face of the proceedings prohibition will not be granted after judgment ordered after if the applicant has had the opportunity of raising the objection before judgment, and has not done so, but has waited and taken the chance of judgment in his favor: *Broad v. Perkins*, 21 Q. B. D. 533; *Mayor of London v. Cox*, L. R. 2 H. L. at p. 233; *Marsden v. Wardle*, 3 E. & B. 695; *Re Soules v. Little*, 12 P. R. 533. But, where absence of jurisdiction appears on the face of the proceedings, prohibition will be ordered after judgment, even where the applicant has consented to or acquiesced in the exercise of jurisdiction by the inferior Court: *Farquharson v. Morgan*, (1894) 1 Q. B. 552; 70 L. T. N. S. 152. Also where the defect is not apparent, but the defendant, instead of moving for prohibition, pleads in the inferior Court the facts ousting the jurisdiction, and that Court improperly decides that it has jurisdiction, prohibition may be obtained after judgment: *Mayor of London v. Cox*, *supra*, at p. 282. And, if there has been no acquiescence, prohibition will be granted after judgment, although the objection does not appear on the face of the proceedings, where the applicant was not previously aware of the facts that raise it: *Serjeant v. Dale*, 2 Q. B. D. 558.

Where prohibition may be had after judgment, it will be granted so long as there is anything to prohibit: *In re Brazill v. Johns*, 24 O. R. 209; but where the proceedings have terminated prohibition will not be ordered, as there is nothing for it to act upon: *Yates v. Palmer*, 6 D. & L. 283.

A party does not waive his right to prohibition by first applying to the inferior Court to set aside its order: *In re Cleghorn v. Munn*, 2 C. L. J. 133; but such an application is not necessary: *Re Forbes v. Michigan Central R. W. Co.*, 20 A. R. 584, at p. 591. The right to prohibition is not lost by taking a step in the cause, where the Court has no jurisdiction over the subject matter: *Lee v. Cohen*, 71 L. T. N. S. 824; *In re Jones v. James*, 19 L. J. Q. B. 257; nor by consenting to a reference: *Re Knowles v. Holden*, 24 L. J. Ex. 223.

If, on a motion for prohibition, the jurisdiction of the inferior Court is upheld, the same objection cannot be again raised on the trial of the action: *Symons v. Rees*, 1 Ex. D. 416.

Consolidated Rule 1100 provides the practice on moving for prohibition. The Master in Chambers cannot entertain the motion: Rule 42 (12). For form of order see Form 138 appended to the Rules.

The application for prohibition may be made by a stranger to the action: *Baker v. Clark*, L. R. 8 C. P. 121; *Jacobs v. Brett*, L. R. 20 Eq. 1.

Manda-
mus.

The High Court has power to compel the Judge or other officer of a County Court to do that which by the duty of his office he ought to do, and for that purpose mandamus will lie. There must first have been a distinct demand made of the party in default, and a refusal: *Re Peck and The Corporation of the County and refusal of Peterborough*, 34 U. C. R. 129; *Rex v. Brecknock and Aber-*
gavenny Canal Co., 3 A. & E. 217. A mere qualified or temporary refusal, as by suggesting an adjournment with a view to an arrangement, is no ground for mandamus: *Irving v. Askew*, 20 L. T. N. S. 584. If the officer is entitled to a fee for the service, it should be tendered when the request for performance is made: *In re Township Clerk of Euphrasia*, 12 U. C. R. 622.

A demand
Fee must
be ten-
dered.

Where the Judge of the County Court has heard the matter, and has decided upon the evidence that he has no jurisdiction to adjudicate between the parties, mandamus will not lie commanding him to hear and determine the matter, although he was wrong: *Ex parte Milner*, *In re Milner v. Rhoden*, 15 Jur. 1037; *Reginn v. The Judge of the Southampton County Court*, 65 L. T. N. S. 320. But if the Judge has refused to hear the matter under the mistaken notion that he had no jurisdiction, mandamus will be granted: *Ibid.*; *Hebling v. Duggan*, 1 C. L. T. 108; *In re Emery and Barnett*, 4 C. B. N. S. 423; but it must appear that the Judge was clearly wrong in thinking he had no jurisdiction: *Pearson v. Glazebrook*, L. R. 3 Ex. 27.

The
Judge's
discretion
will not be
interfered
with.

Mandamus will not lie to interfere with the discretion of the Judge or other officer where he has the right to exercise it, and to determine whether he will act or not: *Re White v. Galbraith*, 12 P. R. 513; *Re O'Brien*, 3 O. R. 326; *Clifton v. Furley*, 31 L. J. Ex. 170; *Re McCallum and Board of School Trustees of Brant*, 17 O. R. 451. But where the act, performance of which is sought to be enforced, is of a ministerial and not of a judicial nature, mandamus will be granted: *Re Massey Manufacturing Co.*, 11 O. R. 444, at p. 463; *In re Oliver v. Fryer*, 7 P. R. 325; *Re Linden v. Buchanan*, 29 U. C. R. 1.

Nor the
practice of
the Court.

The High Court cannot interfere, by mandamus, to regulate the practice of a County Court: *In re the Judge of the County Court of Elgin*, 9 U. C. L. J. 238; *In re Woods v. Rennett*, 12 U. C. R. 167; *Ford v. Crabb*, 8 U. C. R. 274; nor to prescribe what

evidence shall be received or rejected: *The Queen v. Connolly*, 22 O. R. 220; nor to compel the Judge to alter his judgment when given: *In re Burns v. Butterfield*, 12 U. C. R. 140; *Coolican v. Hunter*, 7 P. R. 237. But the Judge of a County Court cannot set up a general rule of practice contrary to the Rules of Court, or which deprives litigants of their statutory rights: *Regina v. The Judge of the Marylebone County Court*, 34 Sol. Jur. 459; *In re Oliver v. Fryer*, 7 P. R. 325.

Mandamus will not be granted when there is another remedy, equally convenient, beneficial and effectual, as by appeal: *The Queen v. Registrar of Joint Stock Companies*, 21 Q. B. D. 131; *Re Marter and Court of Revision of the Town of Gravenhurst*, 18 O. R. 243; *The Queen v. Charity Commissioners for England and Wales*, (1897) 1 Q. B. 407.

Mandamus will not be granted to enable the applicant to do that which is inequitable: *The Queen v. Garland*, L. R. 5 Q. B. 269.

Where the Judge refused to proceed on the ground that one of the parties had alleged upon affidavit that he had an interest in the subject matter, mandamus was refused: *In re the Judge of the County Court of Elgin*, 20 U. C. R. 588.

Where there has been delay in applying, mandamus will be refused: *Cook v. Jones*, 9 W. R. 618; *Re McCallum and Board of School Trustees of Brant*, 17 O. R. 451.

Where performance of a ministerial act is ordered, the mandamus is properly directed to the officer who is to perform the act: *Re Linden v. Buchanan*, 29 U. C. R. 1; *Regina v. Fletcher*, 2 E. & B. 279.

As to the power of the High Court to compel a County Court Judge to perform the duties imposed upon him relating to elections: see *McLeod v. Noble*, 24 A. R. 459; *Re North Perth, Hessian v. Lloyd*, 21 O. R. 538; *Re Simmons and Dalton*, 12 O. R. 505; *McLeod v. Noble*, 28 O. R. 528.

As to the practice in moving for mandamus, see *Consolidated Rules 1080, et seq.*

If a plaintiff obtains a judgment in an inferior Court on a matter over which it had no jurisdiction, he may bring another action in respect of the same matter: *Briscoe v. Stephens*, 2 Bing. 213; *Re Forbes v. Michigan Central R. W. Co.*, 20 A. R. 584, at p. 591; *Keating v. Graham*, 26 O. R. 361. The first judgment is a nullity, and need not be set aside before a fresh action is brought: *Ibid.*

In considering the decided cases upon the jurisdiction of the County Courts regard is to be had to the form in which the matter

has come before the Court. Besides in cases on appeal from County Courts, the question arises on motions for prohibition, on which the applicant must show that in no view of the facts can the County Court have jurisdiction; and on motions for mandamus, which is granted only where the jurisdiction clearly appears. There are also decisions as to the proper scale of costs, which are not safe guides in determining a question of jurisdiction: *Re Crawford v. Seney*, 17 O. R. 74; *Talbot v. Poole*, 15 P. R. 99. Where in an action in the High Court the defendant has so pleaded that a question may arise that a County Court could not try, the plaintiff is entitled to costs on the scale of the High Court, although such question does not arise at the trial: *Ibid.*; and see *Brown v. Hose*, 14 P. R. 3.

Matters
not to be
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risdiction
of County
Courts.

22. Except in the cases of actions in which, by section 27 of this Act, or by any other Act jurisdiction is conferred upon County Courts or a Judge thereof, the said Courts shall not have cognizance of any action:—

Section 27 gives a limited jurisdiction in actions for the recovery of land, by a landlord against his tenant.

Jurisdiction conferred by any other Act is not affected by this section. The section, also, deals only with actions, and the jurisdiction in collateral matters, such as interpleader and garnishment, is not ousted when any of the matters set forth in the section arise: *Munsie v. McKinley*, 15 U. C. C. P. 50.

Title to
land.

1. In which the title to land of a greater value than \$200 is brought in question; or,

Meaning
of.

The words "title to land" are to be given an extended meaning, as in section 38 of this Act.

Title to any hereditament means title to, or interest in, any hereditament: *Chew v. Holroyd*, 8 Ex. 249; 22 L. J. Ex. 95.

The word "title" includes not only the right to what exists, but also the question of its existence: *The Queen v. Everett*, 1 E. & B. 273; *Re Moberly v. The Town of Collingwood*, 25 O. R. 625.

A leasehold interest comes within this sub-section: *Purser v. Bradburne*, 7 P. R. 18; *Flett v. Way*, 14 P. R. 312. Where the question was whether the plaintiff had let the whole of a house owned by him to the defendants, or had reserved certain apartments, this was held to be a question of title to land: *Chew v. Holroyd*, *supra*. Following that case, it was held in *Armstrong v. McGourty*, 22 N. B. R. 29, that whether the defendant was a tenant at will, or from year to year, was a question of title to

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land; but see *Graham v. Spettigue*, 12 A. R. 261, per Hagarty, C.J.O. Where merely the terms and conditions of the tenancy are in dispute there is no question of title to land: *In re English v. Mulholland*, 2 C. L. T. 89. A County Court can try the question whether, under an agreement for the user of land, a right to impound cattle trespassing is acquired: *Graham v. Spettigue, supra*.

Rent issuing out of land comes within this sub-section, when the title to rent is in dispute: *Re Moberly v. The Town of Collingwood*, 25 O. R. 625. But where the right to rent is admitted, but the claim is disputed on the ground of payment, no question of title arises: *Re Whiting v. Sharples*, 9 C. L. T. 141; *In re English v. Mulholland*, 2 C. L. T. 89.

Timber sold while standing is such an interest in land as comes within this sub-section: *McNeill v. Haines*, 13 P. R. 115; and see *The Muskoka Mill and Lumber Co. v. McDermott*, 21 A. R. 129.

Where a mortgagee sued for damages for the removal of a house from the mortgaged premises, and claimed title to the house as a fixture, it was held that an interest in land within this section was in question: *Portman v. Patterson*, 21 U. C. R. 237. But where, in an action for conversion of a mirror, which the defendant claimed as a fixture upon his land, the Judge found as a fact that the mirror was a chattel, it was held that his finding was conclusive, and that no question of title to land was involved: *Re Bushell v. Moss*, 11 P. R. 252.

Rails of a fence built by plaintiff upon defendant's land, under mistake as to the true boundary line, were held not to have become an interest in defendant's land, having been put there for a special purpose: *Re Bradshaw v. Duffy*, 4 P. R. 50.

Where the question was whether lands were subject to an easement, title to land was held to be in dispute: *Sloan v. Davis, 2 Allen, 593.*

The value of the land in question must not exceed \$200. Value.

This means the actual marketable value of the land, and not its value less the amount of any charge upon it: *Elston v. Rose, L. R. 4 Q. B. 4*. It is the value of the property actually in dispute between the parties that is considered, other property enjoyed with it is not included: *Stolworthy v. Powell*, 55 L. J. Q. B. 228; 54 L. T. N. S. 795.

Where the Judge of the County Court has estimated the value of the lands upon a wrong principle, his finding will be reviewed on motion for prohibition: *Elston v. Rose, supra*; but not when he finds the value on conflicting evidence: *Brown v. Cocking, L. R.*

3 Q. B. 672. The decision as to value on a motion for prohibition is binding on the Judge of the County Court, and the question cannot be again gone into at the trial: *Symons v. Rees*, 1 Ex. D. 416.

When question of title raised by plaintiff.

A question of title may be necessarily involved in the plaintiff's claim. Where the plaintiff's claim is for the recovery of land of greater value than \$200, the defendant may apply at once for prohibition on an affidavit of the facts: *Symons v. Rees, supra*. Where an action for damages for injury done to the plaintiff's land, by cutting down trees and erecting a fence, was brought in a County Court, the defendant obtained prohibition at once, without raising the question of title in the County Court, as title must clearly come in question, there being no other ground on which the defendant could pretend to justify his acts: *Sewell v. Jones*, 19 L. J. Q. B. 372, 1 L. M. & P. 525.

But the mere fact that plaintiff's claim contains an allegation of title to land does not exclude the jurisdiction: *Seabrook v. Young*, 14 A. R. 97; it may be immaterial to the action: *Eversfield v. Newman*, 4 C. B. N. S. 418; or the defendant may admit it: *Dutens v. Robson*, 1 H. Bla. 100; and the admission need not be express: *Richardson v. Jenkin*, 10 P. R. 292.

Where the very question that the plaintiff brings into Court is one of title to land, it is immaterial whether the defence is made *bona fide* or *mala fide*; the Court cannot try the action if the lands are of greater value than \$200: see *In re Marsh v. Dewes*, 17 Jur. 558.

Where the question of title is raised by the defendant.

The question of title may be raised by the defendant's pleading.

In such cases the jurisdiction is not ousted unless the pleadings are such as necessarily bring the title in issue: *Talbot v. Poole*, 15 P. R. 99; *O'Brien v. Welsh*, 28 U. C. R. 394; *Graham v. Spettigue*, 12 A. R. 261; *Ball v. Grand Trunk R. W. Co.*, 16 U. C. C. P. 252. Decisions as to the scale on which the costs are to be taxed in actions in the High Court are not always applicable in determining the question of jurisdiction. Where in an action in the High Court the defendant has pleaded matter that may raise a question of title, and so has placed the plaintiff under the necessity of being prepared to prove his title, he will not be heard to say that the plaintiff should not have costs on the scale of the only Court that could try a question of title: *Talbot v. Poole, supra*; *Re Crawford v. Seney*, 17 O. R. 74; *Lake v. Briley*, 5 U. C. R. 307.

In an action between landlord and tenant a plea of *non demisit*, or its modern equivalent, does not necessarily raise a

question of title; nor does a plea of "not possessed" in an action of trespass: *Talbot v. Poole, supra*. A plea of "not guilty by statute" does not bring the question of title to land in issue: *Overholt v. Paris & Dundas Road Co.*, 7 U. C. C. P. 293. The defendant may be estopped from disputing the plaintiff's title by the rule that a tenant cannot dispute his landlord's title: *Talbot v. Poole, supra*; *Bank of Montreal v. Gilchrist*, 6 A. R. 659; *Wickham v. Lee*, 12 Q. B. 521. But the estoppel does not apply where there has been eviction by title paramount: *In re Emery and Barnett*, 4 C. B. N. S. 423; *Macara v. Morrish*, 11 U. C. C. P. 74. A tenant may also dispute his landlord's title on the ground that it has expired since the creation of the tenancy: *Mountnoy v. Collier*, 22 L. J. Q. B. 124; 1 E. & B. 630. Where in an action for rent the defendant denied the creation of a tenancy, in the absence of proof of the tenancy he was not estopped from disputing the plaintiff's title: *Marwood v. Waters*, 13 C. B. 820. See also *Fair v. McCrow*, 31 U. C. R. 599.

A question of title is raised when a party is charged as the owner of land and denies that he is the owner: *Regina v. Harden*, 2 E. & B. 188; see also *Re Knight v. Medora and Wood*, 14 A. R. 112, and *In re Municipality of South Norfolk v. Warren*, 12 C. L. T. 512.

The title pleaded may be the title of a stranger to the action: *Fowley v. Whitehead*, 16 U. C. R. 589; *Campbell v. Davidson*, 19 U. C. R. 222; *Fair v. McCrow*, 31 U. C. R. 599.

Section 38, *post*, provides that where it is intended by a pleading to bring into question the title to land of greater value than \$200, it shall be so expressly stated in the pleading, and the matter relied on for that purpose shall also be set out in the pleading. The jurisdiction of the Court is not ousted until it has decided that title is *bona fide* brought in question by the pleading. See section 39, *post*.

Where a defendant sets up a title to or an interest in land as a defence, the title set up must be such as can exist or the jurisdiction is not ousted: *Hargreaves v. Diddams*, L. R. 10 Q. B. 582; *Lloyd v. Jones*, 6 C. B. 81; *Watkins v. Major*, L. R. 10 C. P. 662; and it must be such a claim of title as would form a defence to the action: *Leatt v. Vine*, 30 L. J. M. C. 207.

Where the title to land is not material to the questions in the action, and the real merits of the case can be decided without any reference to the question of title, the jurisdiction is not ousted: *Re Knight v. Medora and Wood*, 14 A. R. 112; *Morton v. Grand Junction Canal Company*, 6 W. R. 543; *In re Municipality of South Norfolk v. Warren*, 12 C. L. T. 512; *Re Crawford v. Seney*, 17 O. R. 74.

A question of title may arise at the trial and oust the jurisdiction of the Court: *Trainor v. Holcombe*, 7 U. C. R. 548; and see *In re Widmeyer v. McMah* , 22 U. C. C. P. 187; *Heaton v. Cornwall*, 4 P. R. 148.

The Judge must, however, inquire into the case and satisfy himself that title is *bona fide* in dispute. He cannot accept the statement of counsel that title is disputed, and refuse to proceed: *Re Moberly v. The Town of Collingwood*, 25 O. R. 625; *Hebling v. Duggan*, 1 C. L. T. 108; *In re Emery and Barnett*, 4 C. B. N. S. 423; see notes to section 39 as to what is a *bona fide* dispute of the title. Where, in order to make out his title to a chattel in question, the plaintiff must prove at the trial his title to land, a County Court cannot try the action: *Portman v. Patterson*, 21 U. C. R. 237. But where the plaintiff proved his title to the reversion of lands, in an action to recover possession of them from the lessee of his vendor, it was held that there was no question of title that the Court could not try, as the defendant did not in fact dispute the title, nor was there any pretence for disputing it: *Neads v. McMillan*, 29 U. C. R. 415; but see *Howarth v. Sutcliffe*, 44 W. R. 33.

Where in an action for trespass the plaintiff gave evidence of 14 years' possession, the objection that he thereby gave evidence of a possessory title was overruled: *Hawkins v. Rutter*, (1892) 1 Q. B. 668, 61 L. J. Q. B. 146.

The jurisdiction is not ousted by raising a question of title to land in a proceeding collateral to the action, such as interpleader: *Munsie v. McKinley*, 15 U. C. C. P. 50.

Removal of action to the High Court.

Where the Court has not cognizance of the action by reason of the title to land beyond the value of \$200 being brought in question, the action may be removed to the High Court under section 30 or section 32.

Dispute as to validity of a devise, etc.

2. In which the validity of any devise, bequest or limitation exceeding \$200 under any will or settlement is disputed, nor where the assets of the estate or fund out of which the amount in question is payable exceeds \$1,000; or,

It is only a question as to the *validity* of a devise, bequest or limitation that is placed beyond the cognizance of the County Courts by the first part of this sub-section.

The words "exceeding \$200" were inserted by The County Courts Act, 1896, when jurisdiction was conferred in actions for the recovery of land where the value does not exceed \$200 [section

23 (8)], and in actions for payment of a legacy not exceeding \$200 [section 23 (10)].

8. For libel and slander; or,

Libel or
slander.

Prior to The County Courts Acts, 1896, this clause read "libel or slander," and that is no doubt the meaning still intended by the Legislature.

An action for words written and published, relating to articles of the plaintiff's manufacture, and to the plaintiff's rights under letters patent, is not an action of defamation properly so called: Dickerson v. Radcliffe, 17 P. R. 418; and see Odgers on Libel and Slander, 3rd Ed., 145.

4. For criminal conversation or seduction; or,

Criminal
conver-
sation or
seduction.

5. Against a justice of the peace for anything done by him in the execution of his office, if he objects thereto. 59
V. c. 19, s. 1.

Actions
against a
Justice of
the Peace.

By R. S. O. c. 88, s. 16, it is provided as follows:—No action shall be brought in any County or Division Court against a Justice of the Peace for anything done by him in the execution of his office, if the justice objects thereto; and if, within six days after being served with a notice of the action, the justice, or his solicitor or agent, gives a written notice to the plaintiff in the intended action that he objects to being sued in such County or Division Court for such cause of action, no proceedings shall afterwards be had in such County or Division Court in the action, but it shall not be necessary to give another notice of action in order to sue the justice in any other Court.

Where a plaintiff brought his action in the High Court, although no objection had been made to its being brought in a lower Court, he was allowed only such costs as the amount of his verdict would carry: Ireland v. Pitcher, 11 P. R. 403.

R. S. O. c. 88, s. 15, provides:—Every such action shall be tried in the county where the act complained of was committed, and if brought in a County or Division Court, the action shall be brought in the Court of the county or division within which the act complained of was committed, or in which the defendant resides.

And under section 19 of the same Act, where the plaintiff sues in a County or Division Court, and at the trial does not prove that the cause of action arose within the county or division for which such Court is held, he shall be nonsuited, or a verdict shall be given for the defendant.

The action will be beyond the jurisdiction of any County Court other than that pointed out in these sections, and, if brought in the wrong County Court, cannot be transferred to the proper Court under Consolidated Rule 1219. It may, however, be removed to the High Court under section 32, *post*: Howard v. Herrington, 20 A. R. 175.

Jurisdiction allowed.

23. Subject to the exceptions contained in the last preceding section, the County Courts shall have jurisdiction:

Personal actions.

1. In all personal actions where the debt or damages claimed do not exceed the sum of \$200;

Meaning of term.

A personal action is such as concerns the person only, and is brought for the recovery of a debt, or chattels, or for damages: Comyns's Dig. Tit. Action (D. 3); Whidden v. Jackson, 18 A. R. 439; Attorney-General v. Churchill, 8 M. & W. at p. 192.

Personal actions include all common law actions that are not real (as dower), or mixed (ejectment): Hawkes v. Richardson, 9 U. C. R. at p. 232.

There were at common law six different forms of personal actions:—Debt, covenant, detinue, trespass, trespass on the case, and replevin.

Detinue included.

Although the statute speaks of a claim for a sum of money, yet an action of detinue may be brought under this sub-section, the actual value of the goods sought to be recovered being the test of jurisdiction: Taylor v. Addyman, 13 C. B. 309; Leader v. Rhys, 4 L. T. N. S. 330; 10 C. B. N. S. 369. In an action for the delivery up of a deposit note detained by the defendants, the value of the deposit note was held to be merely the amount represented by the cost and trouble the plaintiff would be put to in proving his title to the money, in the event of the note being withheld. If recovery of a bank note or other negotiable security were sought, the value would be the whole amount described on the instrument: Clegg v. Baretta, 56 L. T. N. S. 775.

The claim may be equitable.

Before The County Courts Act, 1896, there was some conflict of opinion as to whether the term "personal actions" in this clause included anything but common law actions: see *Re McGugan v. McGugan*, 21 O. R. 289; Whidden v. Jackson, 18 A. R. 439; *Reddick v. Traders Bank of Canada*, 22 O. R. 449. Section 28, *post*, now provides that every County Court shall have legal and equitable jurisdiction. A plaintiff may therefore bring an action for a money demand not exceeding \$200 in a County Court, although his right is a purely equitable one.

County and, if referred to however, ward v. An action may be brought in a County Court under this Action by clause, by a mortgagor against a mortgagee, to recover, as money Mortgagor received, the surplus derived from the sale, under power of sale, of the mortgaged lands, whatever the amount of the mortgage may have been, so long as the claim is limited to \$200: Reddick v. Traders Bank of Canada, *supra*. But where the mortgagor seeks an account the action is more properly brought under clause 13: see Morton v. Hamilton Provident and Loan Society, 10 P. R. 636; affirmed, 11 P. R. 82.

Independently of clause 9, an action by a partner against his Or by co-partners for a purely money demand, which is part of the partner. partnership assets, may be brought in a County Court, although it may involve the taking of the partnership accounts: Allen v. The Fairfax Cheese Company, 21 O. R. 598.

An action to recover his legacy may also be brought in a Or by County Court under this clause by a legatee against the devisee legatee. of lands charged with payment of the legacy, who has accepted the devise: Longbottom v. Longbottom, 8 Ex. 203; 22 E. J. Ex. 74; Gray v. Richmond, 22 O. R. 256.

Under this clause the County Courts have had jurisdiction, Action for quite apart from any such provision as is contained in clause 8, trespass to land. in actions for trespass to land, limited by the amount sought to be recovered and not by the value of the land: see Seabrook v. Young, 14 A. R. 97; Stewart v. Jarvis, 27 U. C. R. 467; Ball v. The Grand Trunk R. W. Co., 16 U. C. C. P. 252.

An action for a penalty under a statute may be brought in a Action for County Court under this clause, where no other mode is prescribed penalty. for the recovery thereof: Apothecaries Company v. Burt, 19 L. J. Ex. 334; 5 Ex. 363; Brash q. t. v. Taggart, 16 U. C. C. P. 415; Medcalfe v. Widdifield, 12 U. C. C. P. 411; Chaput v. Robert, 14 A. R. 354; also an action for damages for infringement of a patent: Emery v. Iredale, 7 U. C. L. J. 181; and an action for malicious prosecution: Blair v. Asselstine, 15 P. R. 211.

A plaintiff may combine several claims in one action unde this clause, but he cannot recover a greater sum than \$200 in all. Combining claims. McLaughlin v. Schaefer, 13 A. R. 253; Thomson v. Ede, 22 A. R. 105. It is of no consequence how many different items the plaintiff may claim, which added together make a larger demand than \$200, provided he states as his claim for all demands a sum not exceeding \$200: McMurtry v. Munro, 14 U. C. R. 166.

If the addition of interest, accrued upon a claim after issue Interest. of the writ, and before verdict or judgment, brings the amount over \$200, a County Court cannot give judgment therefor: Malcolm v. Levy, 15 P. R. 75; Insley v. Jones, 4 Ex. D. 16. But inter-

est accrued upon the verdict or judgment before the formal entry of judgment may be recovered in a County Court, notwithstanding that the recovery thereby exceeds \$200, such interest being given not by the Court or jury, but by statute: *Sproule v. Wilson*, 15 P. R. 349.

Balance of a claim originally exceeding \$200 may be recovered.

The unpaid balance, not exceeding \$200, of a claim may be recovered, no matter what may have been the original amount of the claim. A County Court has jurisdiction to entertain and investigate accounts and claims of suitors, however large, provided the amount sought to be recovered does not exceed the sum provided by the Act: *Bennett v. White*, 13 P. R. 149; *In re Dixon v. Snarr*, 6 P. R. 336; *Chick v. Toronto Electric Light Co.*, 12 P. R. 58; *In re the Judge of the County Court of Northumberland and Durham*, 19 U. C. C. P. 299; *Neald v. Corkindale*, 4 O. R. 317.

A claim may be reduced by abandonment:

or by payment:

or by set-off, which it is agreed shall operate as payment.

Where the original amount of the claim is over \$200, it may be reduced to an amount within the jurisdiction by abandonment by the plaintiff of the excess; see section 26, *post*, and notes thereto; or by payment before action: *McMurtry v. Munro*, 14 U. C. R. 166; *Brown v. McAdam*, 4 P. R. 54; or by set-off which the parties have agreed before action shall be taken as payment: *In re Dixon v. Snarr*, 6 P. R. 336; *Bennett v. White*, 13 P. R. 149; *Fleming v. Livingstone*, 6 P. R. 63. It is not necessary that the payments should have been specifically applied to any particular items in the account: *McMurtry v. Munro*, *supra*; *In re Dixon v. Snarr*, *supra*. The jurisdiction is not ousted by the defendant's denial of any agreement to treat the set-off as payment, but the Judge may enquire whether such an agreement has been made: *In re Dixon v. Snarr*, *supra*; *Re Jenkins v. Miller*, 10 P. R. 95; *Kimpton v. Willey*, 9 C. B. 719, 19 L. J. C. P. 269. The jurisdiction is not affected by the defendant's alleging that he has not been credited with enough: *Re Jenkins v. Miller*, *supra*.

The agreement that the set-off shall be treated as payment may have been made before the defendant contracted the debt, for the balance of which he is sued: *Fleming v. Livingstone*, 6 P. R. 63; or before the accrual to the defendant of the claim which is set off: *Re Jenkins v. Miller*, *supra*.

Where there has been no agreement that the set-off shall operate as payment, a plaintiff cannot, by allowing credit for the set-off in his claim, compel the defendant to set it up, nor give the Court jurisdiction: *Furnival v. Saunders*, 26 U. C. R. 119; *Sherwood v. Cline*, 17 O. R. 30; *McMurtry v. Munro*, 14 U. C. R. 166; *Neale v. Clarke*, 4 Ex. D. 286; *Beswick v. Capper*, 7 C. B. 669; *Woodhams v. Newman*, 7 C. B. 654.

Payments made after action brought do not affect the jurisdiction, and where in an action in the High Court the amount recovered is within the jurisdiction of a County Court, by reason of a payment made after action brought, the plaintiff is nevertheless entitled to High Court costs: *Kilborn v. Wallace*, 3 O. S. 17; and see *Hodgson v. Bell*, 24 Q. B. D. 525.

The English decisions upon the statute allowing actions to be remitted for trial to a County Court where the claim does not exceed £50, are not applicable here, as the English Statute expressly includes cases where the claim has been reduced by "admitted set-off": see *Lewis v. Lewis*, 20 Q. B. D. 56; *Hodgson v. Bell*, *supra*; *Foster v. Usherwood*, 3 Ex. D. 1.

2. In all causes and actions relating to debt, covenant and contract, to \$600, where the amount is liquidated or ascertained by the act of the parties, or by the signature of the defendant;

Practically nothing is included in this clause, but actions on contract. The word "covenant" does not extend it to cover anything more: see *Billing v. Nicolls*, 5 U. C. R. 622. The old form of action of debt was applied to some cases not arising out of contract, as a claim to recover a statutory debt, such as a penalty, or to recover a debt arising out of privity of estate, as in *Longbottom v. Longbottom*, 8 Ex. 203; 22 L. J. Ex. 74; and such cases may come within this clause if the requirements as to ascertainment of the amount are met.

But the contract, for breach of which the action is brought, need not be for the payment of any sum of money in order that the amount to be recovered may be liquidated. Where an action was brought against the maker of a note for breach of a contract to return it, the damages to be recovered were held to be an ascertained amount, that is, the amount of the note: *Johnson v. Kenyon*, 13 P. R. 24; and see *Greenizen v. Burns*, 13 A. R. 481. If the action were against a party not liable on the note, the damages recoverable would be, not the amount of the note, but its value, and therefore unascertained: *Mayne on Damages*, 5th Ed., p. 391, note T; *Bank of Upper Canada v. Widmer*, 2 O. S. 222, at p. 281.

Where the action sounds in tort, not in contract, the statute does not apply: *Plummer v. Coldwell*, 15 P. R. 144.

The County Courts have jurisdiction up to \$600, not only where the amount sued for is ascertained, but also where it is for the balance of an ascertained amount, no matter how large:

balance of Durnin v. McLean, 10 P. R. 295; Longworth v. McKay, 6 O. S. 149; Donnelly v. Gibson, 5 O. S. 704; Ostrom v. Benjamin, 21 A. R. 467. The claim may be reduced to an amount within the jurisdiction by abandonment, or payment, or set-off, which it has been agreed shall operate as payment, but not by set-off as to which it has not been so agreed: see cases cited under clause 1 of this section, and Donnelly v. Gibson, *supra*. It is only the original amount that need be ascertained; the amount of the payment on account, or set-off which is to operate as payment, may be unascertained: Durnin v. McLean, *supra*.

Combining claim. A plaintiff may combine in one action any number of liquidated claims, or liquidated with unliquidated claims, so long as the amount claimed in respect of unliquidated demands does not exceed \$200 in all, and the total amount claimed does not exceed \$600: Vogt v. Boyle, 8 P. R. 249; McLaughlin v. Schaefer, 13 A. R. 253; Jordan v. Marr, 4 U. C. R. 53; Beattie v. Cook, 6 O. S. 217. But a number of unliquidated claims, exceeding \$200 in all, cannot be combined, and an action brought therefor under this clause. The limit of the jurisdiction in regard to such claims is \$200: McLaughlin v. Schaefer, *supra*; Thomson v. Eede, 22 A. R. 105.

No more than \$600 can be recovered in any case; a claim for \$600 and interest is beyond the jurisdiction: Greenzen v. Burns, 13 A. R. 481; Trimble v. Miller, 22 O. R. 500; Re Young v. Morden, 10 P. R. 276.

Meaning of "liquidated." The word "liquidated" in this clause is to be read in connection with the words "by the act of the parties," etc., and means "settled," "adjusted," "reduced to certainty": Watson v. Severn, 6 A. R. 559; see also McPherson v. McPherson, 5 P. R. 240. "Liquidated by act of the parties" means by their express agreement: Wallbridge v. Brown, 18 U. C. R. 158; Durnin v. McLean, 10 P. R. 295; Robb v. Murray, 16 A. R. 503.

Difficulty seldom arises in the County Courts over a question of ascertainment by the signature of the defendant. When such an ascertainment is not also by act of the parties, it is usually a simple acknowledgment of a debt.

Only the amount need be ascertained. The jurisdiction of the County Courts under this clause is not limited as is that of the Division Courts under R. S. O. c. 60, s. 72 (1 d.), which is held to include only those cases where payment of the amount as ascertained is subject to no contingency whatever: Re Shepherd and Cooper, 25 O. R. 274; McDermid v. McDermid, 15 A. R. 287; Moses v. Moses, 13 P. R. 12 & 144; but see Petrie v. Machan, 28 O. R. 642; Re Sawyer Massey Co. (Limited) and Parkin, 28 O. R. 662, as to the Division Courts.

Certain *dicta* in *Robb v. Murray*, 16 A. R. 503, were regarded as placing a similar limitation upon the jurisdiction of the County Courts under this clause. It was stated in that case that the amount must be ascertained as being due; that there must have been practically an account stated: see *Re McKay v. Martin*, 21 O. R. 104. In the later case of *Ostrom v. Benjamin*, 21 A. R. 467, the Court of Appeal, while approving of the decision in *Robb v. Murray*, confined it to the facts of that case, and disapproved of the language of the judgment as holding that the ascertainment must be as of some debt due. The statute does not require anything else to be ascertained than the amount; everything else may be at large. The liquidation or ascertainment need not be as of a debt due, but may be at the time of making the contract, and before any part of it is performed. "Whenever a sum up to \$400 (now \$600), is agreed on by the parties as the remuneration for a service to be rendered, or for the price of a horse or goods sold, or for any article the subject of sale or purchase, if the service be performed or the article or goods delivered in pursuance of the bargain, the amount can be recovered in the County Court": *Ostrom v. Benjamin, supra*.

The jurisdiction is not limited to cases where the gross amount in one exact sum has been settled between the parties, where a but applies to cases where the Court is able at once, as a mere matter of computation, to ascertain what sum one party has agreed to pay to the other: *Watson v. Severn*, 6 A. R. 559; *Durnin v. McLean*, 10 P. R. 295. A promissory note, payable in three instalments, is payable in three equal instalments, and a claim for one-third of the amount of the note is for an amount ascertained by the signature of the defendant: *In re Babcock v. Ayers*, 27 O. R. 47.

The amount is ascertained by the act of the parties, within the meaning of the statute where there is a contract for payment of a sum, which is a fixed sum when the contract is made, but is unknown to the parties and can be shown only by oral evidence: *Wallbridge v. Brown*, 18 U. C. R. 158; *Watson v. Severn*, 6 A. R. 559; and see *Cushman v. Reid*, 20 U. C. C. P. 147. In *Durnin v. McLean*, 10 P. R. 295, it is assumed that the amount agreed to be paid in *Wallbridge v. Brown* was not only unknown, but also uncertain, at the time of contracting, and was to be made certain by a subsequent act of one of the parties; and so, it is said, that, on an agreement by A. to pay whatever sum B. might be called upon to pay in the purchase of butter, the amount to be paid by A. becomes liquidated so soon as paid by B. In *Re McKay v. Martin*, 21 O. R. 104, a claim for \$250,

The act must be the act of both parties.

under an agreement for the payment by the defendant to the plaintiff of a commission of one per cent. on the sale of lands, which, subsequently to the agreement, had been sold by the defendant for \$25,000, was said to be liquidated within the principle of *Wallbridge v. Brown*. But in no reported case has *Wallbridge v. Brown* been followed to that length, and it is submitted that it does not itself go so far. It does not appear by the report of the case that the defendant was to pay anything that had not, when the agreement was made, been already paid by the plaintiff, and so was then a sum certain, although unknown. To construe the statute, as in the above cases it is said to have been construed in *Wallbridge v. Brown*, would be to include within it claims that have been liquidated by the act of one party only. It has been expressly held that the act of liquidation must be the act of both parties: *Robb v. Murray*, 16 A. R. 503. In *Davidson v. The Belleville and North Hastings R. W. Co.*, 5 A. R. 315, where the plaintiff had been employed by the defendants at \$30 per month, for such time as he might serve under the contract, his claim for wages for a period during which he served under the contract was held to be wholly unliquidated. Where the defendants had given a bond for payment of the costs that might be awarded the plaintiff on an appeal to the Supreme Court, and it was argued that the parties had thereby agreed to adopt the act of the Court, in ascertaining the amount of costs, as their own, it was held that the amount was not liquidated by the act of the parties: *Hager v. Jackson*, 16 P. R. 485.

Action upon a judgment.

In an action upon a judgment a County Court will not have jurisdiction if the amount is over \$200: *Davidson v. Cameron*, 8 P. R. 61; nor in an action upon a certificate issued under The Creditors' Relief Act. *In re Tavistock Milling Co. v. Gurnet, Falconbridge*, J., 30th December, 1896; even though the claim upon which the judgment or certificate was based was for an ascertained amount: *Ibid.*

Entries of amounts received by the defendant, made by him but not assented to by the plaintiff, are not an ascertainment within the statute: *Robb v. Murray*, 16 A. R. 503. The mere rendering an account with prices stated is not an ascertainment of the amount by act of the parties: *Montgomery v. McDonald*, 1 Man. L. R. 232. The price must be agreed upon by the parties: *Watson v. Severn*, 6 A. R. 559; *Durnin v. McLean*, 10 P. R. 295.

The amount may be ascertained by an agent.

An account may be stated by an agent, and as the statute is satisfied by something less than an account stated, the act of the parties, by which the amount is ascertained, may be the act

of their agents: *McMurtry v. Munro*, 14 U. C. R. 166; *Bates v. Townley*, 2 Ex. 152. The signature of an agent is also, no doubt, a sufficient signature of the defendant, when ascertainment in that manner is relied upon: see *Regina v. The Justices of Kent*, L. R. 8 Q. B. 305; *In re Whitley Partners, Limited*, 32 Ch. D. 337; *France v. Dutton*, (1891) 2 Q. B. 208.

An admission of the amount owing made to a third person by the defendant is not an ascertainment within the statute: *McMurtry v. Munro, supra*.

Where a guarantor is sued, an ascertainment by the creditor and the principal debtor of the amount of the indebtedness is not binding on the guarantor: *Thomson v. Eede*, 22 A. R. 105; *Ex parte Young*, 17 Ch. D. 668.

The statute includes actions between the personal representatives of the parties by whom the amount was ascertained: see *Watson v. Severn*, 6 A. R. 559.

The ascertainment may, of course, be after the contract is made and at any time before action brought: *White Sewing Machine Co. v. Belfry*, 10 P. R. 64. But it must be before action brought. Bringing an action for the amount admitted by the defendant is not such an assent on the part of the plaintiff as will make the amount one liquidated by the act of the parties: *Robb v. Murray*, 16 A. R. 503.

The defendant's denial of the fact of liquidation will not prevent the operation of the statute: *Ostrom v. Benjamin*, 21 A. R. 467.

The question whether the amount was ascertained may properly be left to the jury: *Watson v. Severn*, 6 A. R. 559.

Where, in an action in the High Court, the defendant pleaded that his indebtedness to the plaintiff was less than the amount sued for, it was held that, in determining the scale of costs taxable to the plaintiff, the pleadings only should be looked to, and the defendant was not allowed to show by affidavit that the amount had been fixed by the contract at the sum claimed by the plaintiff: *Brown v. Hose*, 14 P. R. 3.

Where the plaintiff holds a note for his claim, he cannot by suing on the consideration, instead of on the note, recover costs on a higher scale: *White Sewing Machine Co. v. Belfry*, 10 P. R. 64.

3. To any amount on bail-bonds given to a sheriff in ^{Bail bond} any case in a County Court, whatever may be the penalty;

The jurisdiction in such actions was, under a former statute, expressly confined to the Court in which the original action had been brought: see 8 V. c. 13, s. 21.

Recogniz- 4. On recognizances of bail taken in a County Court, ances. whatever may be the amount recovered or for which the bail therein may be liable;

As in cases under the preceding clause, the jurisdiction was formerly expressly confined to the Court in which the original action had been instituted: see 12 V. c. 66, s. 7, and Smith v. Russell, 8 U. C. R. 387.

Replevin. 5. In actions of replevin where the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of \$200, as provided in The Replevin Act;

The Replevin Act, R. S. O. c. 66, provides as follows:—

2. Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities or other personal property or effects have been wrongfully distrained under circumstances in which by the law of England, on the 5th day of December, 1859, replevin might have been made, the person complaining of such distress as unlawful may bring an action of replevin, or where such goods, chattels, property or effects have been otherwise wrongfully taken or detained, the owner or other person capable of maintaining an action for damages therefor may bring an action of replevin for the recovery of the goods, chattels, property or effects, and for the recovery of the damages sustained by reason of the unlawful caption and detention, or of the unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses.

3. No party to an action or proceeding in any Court shall replevy or take out of the custody of the sheriff, bailiff, or other officer, any personal property seized by him under process against such party.

7. In case the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of \$200, and in case the title to land is not brought in question, the action may be brought in the County Court of any county wherein the goods or other property or effects have been distrained, taken or detained.

The value of the goods is not the capricious value put upon them by either party, but is a matter to be decided by the Court: *Taylor v. Addyman*, 13 C. B. 309; *Wheeler v. Sime*, 3 U. C. R. 265.

It is not necessary that the writ of summons should show the value of the goods: *Dunlap v. Babung*, 27 N. B. R. 549; and see No. 7 of the Forms appended to the Consolidated Rules. But the affidavit in support of the application for a replevin order must show the value of the property: Consolidated Rule 1068; and it must also be stated in the order, Consolidated Rule 1071.

The County Courts in England have a general jurisdiction in replevin, not limited by the value of the goods, nor excluded when title to land is brought in question: see *Fordham v. Akers*, 4 B. & S. 578; 33 L. J. Q. B. 67.

No amendment has been made to section 7 of The Replevin Act corresponding to the change made in clause 1 of section 22 of The County Courts Act, which now excludes the jurisdiction only where the title to land of a greater value than \$200 is brought in question.

By sections 2 and 7 of The Replevin Act it would appear that a plaintiff may recover in a replevin action in a County Court goods to the full value of \$200, and in addition thereto damages sustained by reason of the unlawful caption or detention.

Jurisdiction is given only to the County Court of any county in which the goods have either been wrongfully distrained or taken, or been wrongfully detained, and the plaintiff must show such a distress, or taking, or detention within the county in which he sues as will support his action: *Hoover v. Craig*, 12 A. R. 72.

The Consolidated Rules as to venue do not affect the provision of The Replevin Act as to the County Court in which the action is to be brought; the matter is one of jurisdiction and not of practice. If the action is brought in any County Court other than that indicated by the statute, the Court will have no jurisdiction over the action, even to change the venue to the proper county: *Howard v. Herrington*, 20 A. R. 175. The action may, however, be transferred to the High Court under section 32, *post: Ibid.*

Every detention is a new taking, and replevin will lie though there has been no wrongful taking, but a detention only is complained of: *Deal v. Potter*, 26 U. C. R. 578.

In *Hoover v. Craig*, 12 A. R. 72, the original taking of the plaintiff's chattel became wrongful by reason of the wrongful removal thereof to another county and detention there, and it was held that the action might be brought in the county where the taking had been.

If the goods are in another county when the action is brought, the Court has power to issue an order of replevin to the sheriff of such other county: *Hoover v. Craig, supra*.

Where a replevin bond has been given in a County Court and an action is brought thereon for not prosecuting the suit to a successful conclusion, a plea that the County Court Judge refuses to try the replevin action on the ground that it is beyond his jurisdiction is no defence: *Welsh v. O'Brien*, 28 U. C. R 405.

For the practice in actions of replevin, see Consolidated Rules 1067-1079.

Inter-pleader. 6. In interpleader matters, as provided by the rules respecting interpleader: R. S. O. 1887, c. 47, s. 19; 59 V. c. 19, s. 2.

Consolidated Rules 1102-1128 are the rules respecting interpleader. Rules 1123 and 1124 relate to the jurisdiction of the County Courts to grant relief by interpleader. Rules 1125-1128 provide for the trial in County and Division Courts of issues sent down from the High Court.

Relief by Inter-pleader. Rule 1123 (1). Rule 1123. Relief by interpleader may be granted in the County Courts:

1. Where the person seeking relief (hereinafter called the applicant) is under liability for any debt, money, goods or chattels, for or in respect of which he is or expects to be sued by two or more persons (hereinafter called the claimants), making adverse claim thereto; and in such case:

(a) Where the applicant is being so sued in a County Court, the application may be to the Judge of the County Court in which the action is pending; and,

(b) Where the applicant is not being so sued and the debt, money, goods or chattels in question do not exceed in value \$200, the application may be to the Judge of the County Court of the county in which the applicant resides, or in which the money, goods and chattels are situate:

The words "so sued" in both clauses and (b) plainly do not mean "sued by two or more persons making adverse claim." Clause (a) would seem to apply also where only one action is

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pending, as it proceeds to speak of "the action"; see also R. S. O. 1887, c. 54, s. 2, as to the jurisdiction formerly possessed by the County Courts. Clause (b) evidently applies only where no action whatever is pending, otherwise the Judge to whom the application is directed to be made might be asked to interfere with proceedings in another Court, which he is given no power to do. The meaning would be more correctly expressed by the omission of the word "so" from both clauses.

In case the applicant has been sued by two or more persons in different Courts, he must make his application in the High Court.

Under the Consolidated Rules, 1888, there was a doubt as to the jurisdiction of the County Courts to grant relief by interpleader in the class of cases provided for by part 1 of this Rule. See *Re Anderson and Barber*, 13 P. R. 21; *Re Gould v. Hope*, 20 A. R. 347.

2. Where the applicant is a sheriff, and claim is made to Rule 1123 any money, goods or chattels taken or intended to be taken in execution under a writ of execution, or to the proceeds or value thereof, by any person other than the person against whom the writ was issued; and in such case the application may be made to the Judge of the County Court of the county in which such money, goods or chattels are so taken, or intended to be taken, notwithstanding that the writ may have been issued from another County Court, or that writs may have been issued from two or more County Courts.

Inter.
pleader by
Sheriffs.

"Sheriff" is defined by Rule 1102 (c): "Sheriff" shall mean a sheriff, coroner, elisor, or other officer charged with the execution of any writ or process of the High Court, or of a County Court in cases where Rule 1123 applies.

Rule 1123 does not apply to a case where lands are taken in execution; a sheriff, therefore, seizing lands under a County Court writ is not a "sheriff" within the Rules respecting interpleader. Where claim is made to the proceeds or value of lands seized, relief may probably be given the sheriff under Rule 1103 (a), or part 1 of Rule 1123: see *Re Gould v. Hope*, 20 A. R. 347.

It does not matter what the value of the goods seized, or the amount claimed under the execution may be; wherever the only process in the sheriff's hands has issued from the County Courts, the application may be made to the Judge of the County Court of the county in which the process was, or is to be executed: *Isbister v. Sullivan*, 16 O. R. 418.

Such application may be made although writs have been issued from two or more County Courts. But for this express provision relief could be had only from the High Court in such a case: see *Phipps v. Beamer*, 8 P. R. 181; *Masuret v. Lansdell*, 8 P. R. 57. One application and one order are sufficient where the sheriff has more than one writ: Rules 1117 and 1118.

Where there are writs from the High Court as well as from a County Court, the application is made to the High Court: Rule 1119.

Where after seizure under an execution from a County Court, but before sale, an execution from a Superior Court against the same goods was placed in the sheriff's hands, the interpleader application was properly made in the Superior Court: *Strange v. Toronto Telegraph Co.*, 8 P. R. 1.

Where the application must be made to the High Court, the sheriff is entitled to costs on the High Court scale, even as against a creditor whose execution has issued from a County Court: *Arkell v. Geiger*, 9 P. R. 523; *Phipps v. Beamer*, 8 P. R. 181.

An interpleader proceeding not being an action, except within the meaning of the Consolidated Rules (see Rule 6 (e)), the jurisdiction is not ousted by section 22 when a question of title to land arises: *Munsie v. McKinley*, 15 U. C. C. P. 50.

Subse-
quent pro-
ceedings.

Rule 1124. All subsequent proceedings shall be had and taken in the county where the application is made; but the Judge to whom the application is made may order that the subsequent proceedings be had and taken in any other county, if that course seems just and more convenient.

Before the Rule of 23rd June, 1894, the subsequent proceedings could be taken only in the county where the goods were seized, or in that from which the process issued.

Where the Judge orders the subsequent proceedings to be taken in another county under this Rule, he cannot reserve the question of costs, or any other question to be disposed of by himself; the whole proceedings subsequent to the order must be taken in one Court or the other: *Nicholls v. Lundy*, 16 U. C. C. P. 160; *Coyne v. Lee*, 14 A. R. 503.

The venue in interpleader cannot be changed under Consolidated Rule 1219; it is chosen once for all by the Court which hears the interpleader application: *Coyne v. Lee*, *supra*.

TRIAL OF ISSUES IN COUNTY OR DIVISION COURTS.

Rule 1125. (1) Where the amount claimed under or by virtue of writs of execution in the sheriff's hands, issued out of one issue may or more Courts, does not exceed the sum of \$400, exclusive of interest and sheriff's costs, or when the goods seized are not, in the opinion of the Judge, or other person making the order, of the value of more than \$400, the order directing an issue to be tried may direct that the issue shall be drawn up and tried in the County Court of the county in which the issue would, under the provisions of Rule 1124 be tried, and in such case the issue shall be drawn up, filed and tried in the County Court, and all subsequent proceedings therein, up to and inclusive of judgment and execution, shall be had and taken in the County Court which shall, where any of the writs of execution were issued out of the High Court, have jurisdiction in the premises as fully as though the same had issued out of the County Court.

(2) Where an application is made for an order under this Rule upon the ground that the goods seized are not of the value of more than \$400, a list of the goods and of the value placed upon them shall be set out in the affidavits upon which the application is based.

This rule applies only to interpleader granted on a sheriff's application.

The issue may be sent down for trial in a County Court:

1. Where the amount claimed under the executions in the sheriff's hands, exclusive of interest and sheriff's costs, does not exceed \$400.

2. Where the goods seized are not, in the opinion of the Judge, of the value of more than \$400; and in such a case a list of the goods and their value is to be set out on affidavit.

An order may be made, however, under the rule, although the list of goods and their value is not set out, if the goods do not exceed \$400 in value in the opinion of the Judge, that being the important part. *Close v. Exchange Bank*, 11 P. R. 186, distinguishing *Barker v. Leeson*, 9 P. R. 107.

It is optional with the Judge who hears the application to order the issue to be tried in a County Court: *Coyne v. Lee*, 14 A. R. 503; *Close v. Exchange Bank*, *supra*. Both parties being represented on the application, either of them may apply for such an order; and if no such order is made, the successful party in the issue will be entitled to costs on the scale of the High

Court: Christie v. Conway, 9 P. R. 529; Frost v. Lundy, 14 C. L. T. 191; not following Beatty v. Bryce, 9 P. R. 320.

Where an order is made under this rule, the jurisdiction over the interpleader proceedings is absolutely and finally transferred from the High Court to the County Court, and all the proceedings must be carried on in the County Court, except as provided in Rule 1127: Coyne v. Lee, *supra*; Close v. Exchange Bank, *supra*; Clancey v. Young, 15 P. R. 248.

The issue cannot be withdrawn from the County Court named in the order, and sent for trial to another County Court: Coyne v. Lee, *supra*.

A motion to postpone the trial must be made in the County Court, but a motion in relation to the terms of the original order may be made in the High Court: London and Canadian Loan and Agency Company v. Morphy, 11 P. R. 86; Robinson v. Richardson, 32 U. C. R. 344. In Connell v. Hickock, 15 A. R. 518, the Judge of the County Court considered that he could not add a party to an issue sent to him for trial.

Trial of
other
issues in
County
Courts.

The Consolidated Rules make no provision that the High Court may direct the trial in County Courts of any issues, except such as are ordered on a sheriff's application for interpleader: Clancey v. Young, 15 P. R. 248; Teskey v. Neil, 15 P. R. 244; Coyne v. Lee, 14 A. R. 503. But the jurisdiction of the Court of Chancery, under R. S. O. 1877, c. 40, s. 99, to direct the trial of an issue in a County Court is probably vested in the High Court: Clancey v. Young, *supra*. In such cases the County Court obtains power merely to try the issue; all subsequent proceedings, including any motion in respect to the judgment, or for a new trial, are to be taken in the High Court: Clancey v. Young, *supra*; Teskey v. Neil, *supra*; Wilson v. Wilson, 3 A. R. 400; Barker v. Leeson, 9 P. R. 107.

Rule 1126. Where the amount of the execution or the value of the goods does not exceed \$100, the issue may be directed to be tried in a Division Court, and thereafter all proceedings shall be carried on in such Court.

Rule 1127. The proceedings for and relating to the order for costs, and for obtaining money out of Court, when the same has been paid into Court by the sheriff, and for such other purposes as may be necessary, may, in the cases provided for in the Rules 1125 and 1126, be taken either in the original cause or before the Judge of the County Court, or Division Court, as the

case may be, who tried the issue, and he shall have power and authority to make such order in the premises as a Judge has heretofore had in such cases.

The sheriff is not a party to the proceedings in the County Court and cannot be ordered to pay costs: *Temple v. Temple*, 63 L. J. Q. B. 556.

Rule 1128. In respect of all such proceedings had in the County Court, or Division Court, the costs and disbursements shall be taxed upon the County Court, or Division Court scale.

As to appeals in interpleader matters, see sections 51 and 52, *post*.

7. In any cause or action relating to debt, covenant and contract where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant, when the plaintiff and defendant, before the issue of the writ, agree by memorandum in writing signed by them and filed upon the application for the writ, that the Court shall have power to try the action;

As to the class of cases coming within this clause, see notes to clause 2 of this section.

The jurisdiction here given is expressly made subject to the exceptions contained in section 22, and the Court will not have power, notwithstanding the consent, to dispose of any action involving any of the matters mentioned in that section.

Actions brought under this clause are to be distinguished from those cases where the parties have consented that the Judge may try the case, although it is beyond his jurisdiction, and are bound by his decision as that of an arbitrator, and have no right of appeal. See *Hutson v. Valliers*, 19 A. R. 154; *Teskey v. Neil*, 15 P. R. 244.

8. In actions for the recovery of or for trespass or injury to land where the value of the land does not exceed \$200; Recovery of land.

This clause was added by The County Courts Act, 1896. Independently of it the County Courts have had jurisdiction, under clause 1 of this section, in actions for trespass or injury to land, limited by the amount of damages claimed, and not by the value of the land. See *Stewart v. Jarvis*, 27 U. C. R. 467; *Ball v. The Grand Trunk R. W. Co.*, 16 U. C. C. P. 252; *Richardson v. Jenkin*, 10 P. R. 292; *Seabrook v. Young*, 14 A. R. 97.

Section 27 of this Act also confers jurisdiction in certain actions for the recovery of land, by a landlord against a tenant.

As to the proper manner of valuing the land in dispute, see notes to clause 1 of section 22, *ante*.

By section 36, actions under this clause shall be brought and tried in the county where the land is, unless by consent of the parties, or unless the place of trial is changed.

Where part of the land is in one county and part in another, the action must be brought in the High Court: see *McCrea v. Easton*, 19 C. L. J. 331.

Partnership
ship
accounts.

9. In actions by persons entitled to and seeking an account of the dealings and transactions of a partnership, the joint stock or capital not having been over \$1,000, whether such account is sought by claim or counter-claim;

Former
equity
juris-
diction.

The jurisdiction under this and the four following clauses is similar to the equity jurisdiction conferred upon the County Courts by 16 V. c. 119, and withdrawn by 32 V. c. 6, s. 4.

From the passing of the latter Act until the recent consolidation of the Rules of Practice, actions which could formerly have been brought in the County Courts under their equity jurisdiction, could be brought in the Superior Court under a lower tariff of costs. See *Consolidated Rules, 1888, No. 1219*.

Under the former equity jurisdiction of the County Courts, the action must have been brought in the county where the defendant resided: *Doubledee v. Credit Valley R. W. Co.*, 8 P. R. 416; *Lawrason v. Fitzgerald*, 9 Gr. 371; *McLeod v. Millar*, 12 Gr. 194; and the jurisdiction was not ousted when a question of title to land arose: *Rae v. Trim*, 8 P. R. 405. The jurisdiction under the present Act differs in both these respects.

Jurisdi-
ction not
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expired.

The above clause 9 contains nothing limiting the jurisdiction to the case of a partnership dissolved or expired, and section 36 contemplates the case of a partnership which has a place of business. The County Courts have no jurisdiction, however, in actions for the dissolution of a partnership, except where the case comes within clause 13 of this section, and the rule is that an account will not be ordered of the dealings of an existing partnership, unless a dissolution is also prayed. This rule may be departed from in special cases, as where the partnership is for a term of years still unexpired, and one partner has sought to exclude, or expel his co-partner, or drive him to a dissolution: *Wallworth v. Holt*, 4 My. & C. 619, pp. 635-639; *Fairthorne v. Weston*, 3 Ha. 387; *Richards v. Davies*, 2 R. & M. 347.

But no
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ction to
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solution.

The "joint stock" is everything that the members of the partnership possess as partners; the "capital" is the aggregate of "joint stock" and of the sums contributed by the partners for the purpose of commencing or carrying on the partnership business, and intended to be risked by them in that business: *Lindley on Partnership*, 5th ed., pp. 320 and 322.

A partnership may exist without either *joint stock* or *capital*: *Fromont v. Coupland*, 2 Bing. 170; *Lovegrove v. Nelson*, 3 M. & K. 1; *French v. Styring*, 2 C. B. N. S. 357.

Probably, if either the joint stock or the capital is not over \$1,000, the action may be brought in a County Court: see *Harrington v. Ramsay*, 8 Ex. 879; 22 L. J. Ex. 326; 2 E. & B. 669; 22 L. J. Q. B. 460, and *Maxwell on Interpretation of Statutes*, 3rd ed., p. 331.

Where the plaintiff had contributed \$87.39 and the defendant \$233.89 to the capital of a partnership entered into by them for the performance of a \$2,000 contract, it was held that the parties must have contemplated a larger outlay than \$800, and that the case was not one clearly within the former equity jurisdiction of the County Courts: *Blaney v. McGrath*, 9 P. R. 417. This is a decision upon the scale of costs taxable, and is perhaps not to be followed in determining a question of jurisdiction.

Apart from the jurisdiction conferred by this clause, a Action by County Court can entertain, under clause 1, an action by a partner to recover against his co-partners to recover his share not exceeding \$200, which is part of the partnership assets, all of assets. though it may involve the taking of the partnership accounts: *Allen v. The Fairfax Cheese Company*, 21 O. R. 598.

Special provision is made by section 24 for transferring to the High Court actions brought under this clause, and found to be beyond the jurisdiction in point of amount, and by section 25 the action may be continued in the County Court by leave when the joint stock or capital does not exceed \$1,500.

Section 36 provides that actions under this clause shall be brought and tried in the county where the partnership had or has its principal place of business.

10. In actions by a legatee under the will of any deceased person, such legatee seeking payment or delivery of his legacy not exceeding \$200 in amount or value out of such deceased person's estate not exceeding \$1,000;

This clause applies only to actions against the legal representative of the testator, for payment out of the estate come to only to

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his hands to be administered: *Rustin v. Bradley*, 28 O. R. 119. An action by a legatee against the devisee of lands charged with payment of the legacy, to enforce payment by sale, is not within this clause; but such an action may be brought under clause 13, where the amount of the legacy does not exceed \$200: *Ibid.* A personal action, within the meaning of clause 1, also lies against the devisee in such a case: *Longbottom v. Longbottom*, 8 Ex. 203; 22 L. J. Ex. 74. A personal action also lies against an executor to recover a specific legacy to which he has assented: *Doe v. Guy*, 3 East 120; *William v. Lee*, 3 Atk. 223.

The assignee of a legatee, or his next of kin or other representative, may bring an action under this clause: *Turner v. Rennoldson*, L. R. 16 Eq. 37; 42 L. J. Ch. 510.

Does not
apply to
cases of
trust.

Where an executor is charged, not with the mere payment of a legacy, but with the distribution of money in the execution of a trust, the action cannot be brought in a County Court under this clause. Where property was left in trust to invest in government securities, to pay the dividends to the widow during her life, and, after her death, to dispose of the whole estate, with a bequest, *inter alia*, of a certain sum to be divided equally among four children, it was held in an action by one of them to recover his share that this was a matter of trust, and that the action was not such as this clause includes: *Beard v. Hine*, 10 W. R. 45.

A bequest of money in trust to invest the same during the minority of an infant, and to pay it to him when of age, with power to apply it towards his education or advancement during infancy, is not a "legacy" within the statute: *Hewston v. Phillips*, 11 Ex. 699; 25 L. J. Ex. 133.

But, where the case is one of a simple trust to pay, an action may be brought under this clause. Where residuary estate is left to executors as trustees to divide among certain persons, the share of one of such persons is a "legacy" and not a trust: *Pears v. Wilson*, 6 Ex. 833; see also *Fuller v. MacKay*, 2 E. & B. 573.

In an action to recover a legacy a County Court has power to try a question of *devastavit*: *Winch v. Winch*, 13 C. B. 128.

Removal
to High
Court.

Section 24 provides for the transfer to the High Court of actions under this clause which are found to involve an amount beyond the jurisdiction. By section 25, leave may be granted to continue such an action in the County Court where the estate does not exceed \$1,500.

Place of
trial.

Actions under this clause must be brought and tried in the county where letters probate or of administration have issued,

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or where the deceased resided at the time of his death: Section 36.

11. In actions by a legal or equitable mortgagee whose Actions on mortgage has been created by some instrument in writing, or a judgment creditor, or a person entitled to a lien or security for a debt, seeking foreclosure or sale, or otherwise, to enforce his security, where the sum claimed as due does not exceed \$200;

By Consolidated Rules 1015-1020, provision is made whereby a judgment creditor in a County Court may enforce his judgment by a sale of lands of which the debtor has made a fraudulent conveyance, or by a sale of the debtor's equitable interest in land.

Mechanics' liens are now enforced by proceedings in the Mechanics' High Court under R. S. O. c. 153. The Act, R. S. O. 1887, c. 126, under which the County Courts exercised jurisdiction in such cases was repealed by 59 V. c. 35, and they have now no jurisdiction therein: *Re Ribble v. Aldwell*, 18 C. L. T. 59. But in an action instituted in the High Court, the trial may be had before the Judge of a County Court: R. S. O. c. 153, s. 33.

Where there are subsequent mortgagees or other incumbrancers, who are to be brought into the proceedings, the amount of their claims is to be added to the claim of the plaintiff as part of the amount claimed in the action, and if the aggregate of all the claims exceeds \$200 the action is beyond the jurisdiction of a County Court: *Hyman v. Roots*, 11 Gr. 202; *Seath v. McIlroy*, 2 Chy. Chrs. 93; *Mitchell v. Martin*, 2 C. L. J. 249; and see cases cited under clause 13, *post*. In *Re Scott, Hetherington v. Stevens*, 15 Gr. 683, it was said that *Hyman v. Roots* does not decide that the County Courts have not jurisdiction where the plaintiff's claim, together with the amount of other incumbrances on the estate of the debtor, exceeds \$200. This was said, however, under an evident misapprehension, the Vice-Chancellor overlooking the fact, that, in the part which he quotes from his judgment in *Hyman v. Roots*, he had reference, not to the action of *Hyman v. Roots* in which the plaintiff was an incumbrancer to an amount exceeding £50, but to the supposed case of a bill filed by the original mortgagee, Carling, in which case the plaintiff's claim would have been less than £50, but the defendant McIntosh being an incumbrancer to an amount exceeding £50, the County Court would have had no jurisdiction.

Removal
to High
Court.

An action brought under this clause may, like any other action, be transferred to the High Court when it is found to be beyond the jurisdiction of a County Court. It may not be possible, however, to ascertain the amount of the claims of the various incumbrancers until a reference is had, and after judgment an action cannot be transferred to the High Court: *Sherk v. Evans*, 22 A. R. 242. In a mechanics' lien action it was held that where the aggregate of the apparently valid claims against the property exceeded \$200, the action was properly brought in the High Court, and the plaintiff's right to costs was not affected by the failure of one of the incumbrancers to establish his claim: *Hall v. Pilz*, 11 P. R. 449.

An assignee or personal representative of the mortgagee may bring an action in a County Court, wherever there would be jurisdiction, if the mortgagee himself sued: *Turner v. Renoldson*, L. R. 16 Eq. 37; 42 L. J. Ch. 510.

Action
may be
brought
in any
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The statute does not confine the jurisdiction under this clause to the County Court of the county where the property is, and it would, therefore, appear that the action may be brought in any County Court: see *ante* p. 30. Although a mortgage action in which possession of the lands is claimed may be an action for the recovery of land (see *Seymour v. DeMarsh*, 11 P. R. 472), section 36 is confined to such actions for the recovery of land as are brought under clause 8 of this section, or under section 27. By section 44 the County Courts have power to make orders, etc., which shall have effect in any county; and see *Rustin v. Bradley*, 28 O. R. 119.

12. In actions by a person entitled to redeem any legal or equitable mortgage or any charge or lien, and seeking to redeem the same, where the sum actually remaining due does not exceed \$200;

Actions
for re-
demption.

An action to set aside a sale and for redemption is within this clause: *Powell v. Roberts*, L. R. 9 Eq. 169; 39 L. J. Ch. 44.

It would, perhaps, have been well had the Legislature extended the provisions of section 24, by which an action may be transferred to the High Court even after judgment, to this clause, and to clauses 11 and 13. The amount due will commonly be ascertained only upon a reference after judgment, when it is too late to have the action removed to the High Court: see *Sherk v. Evans*, 22 A. R. 242.

Equitable
relief.

13. In actions by any person seeking equitable relief in respect of any matter whatsoever, where the subject matter involved does not exceed \$200;

The jurisdiction under this clause is to be distinguished from that given by section 28, under which every County Court has power to grant in any action or proceeding in such Court, such relief, redress or remedy as might be granted in the like case by the High Court. In order that a plaintiff may obtain relief under section 28, he must first have a cause of action that is within the jurisdiction of the Court independently of that provision, but by the present clause the County Courts may grant equitable relief in respect of any matter whatsoever where the subject matter involved does not exceed \$200.

Where the relief sought is payment of a money demand by Meaning a sale of property of the defendant, as in an action to set aside of subject a fraudulent conveyance, the subject matter involved is, *prima facie*, the amount claimed by the plaintiff: *Forrest v. Laycock*, 18 Gr. 611; *McKay v. Magee*, 13 P. R. 106; *ibid.* 146; *Rustin v. Bradley*, 28 O. R. 119; *Bank of Toronto v. Le Curé*, etc., *de la money Paroisse de la Nativité*, 12 S. C. R. 25; *Flatt v. Ferland*, 21 S. C. R. 32.

If, however, there are other creditors whose claims are charges upon the property, and who are entitled under the Creditors' Relief Act, or otherwise, to share with the plaintiff in the proceeds of a sale, or if the action is brought on behalf of all creditors, and other creditors come in and prove their claims, the subject matter involved is the aggregate of all the claims: *Dominion Bank v. Heffernan*, 11 P. R. 504; *Hall v. Pilz*, 11 P. R. 449; *Morphy v. Fawkes*, 34 C. L. J. 38; 18 C. L. T. 20; 18 P. R. 24.

So in an action to obtain payment out of the estate of a deceased person, a County Court will not have jurisdiction if debts amounting to over \$200 are proved: *Goldsmith v. Goldsmith*, 17 Gr. 213.

But, where a sale is sought subject to a prior incumbrance, the amount of such prior incumbrance is not to be included as part of the subject matter involved: *In re Scott, Hetherington v. Stevens*, 15 Gr. 683.

Where the plaintiff claimed \$200, an instalment of a monthly allowance under a will of which the defendant was executrix, it was held that the amount in controversy was merely the \$200, and was not affected by any consideration of the effect the decision might have on the right to future payments: *Rodier v. Lapierre*, 21 S. C. R. 69.

Where an account is sought by a mortgagor of the proceeds of a sale by the mortgagee under his power of sale, the subject matter is, *prima facie*, the sum realized by the sale: *McGilligan v. Griffin*, 20 Gr. 81; *Morton v. Hamilton Provident and*

Loan Society, 10 P. R. 636; affirmed 11 P. R. 82; see, however, Reddick v. Traders Bank of Canada, 22 O. R. 449; Re Legarie v. The Canada Loan and Banking Co., 11 P. R. 512.

Where a third mortgagee claimed the surplus proceeds of a sale by the first mortgagee on the ground that the second mortgage was void for want of consideration, it was held that the subject matter involved was the whole amount of the second mortgage: *Re Lyons*, 10 P. R. 150.

Where the defendants had distrained the plaintiff's goods for \$12.55, interest overdue on a mortgage for \$2,300, it was held in an action in which the defendants' right to distrain under their mortgage was questioned, that the subject matter was beyond the former equity jurisdiction of the County Courts: *McDonell v. The Building and Loan Association*, 11 P. R. 413.

Specific performance of agreement for sale of land.

Value of subject matter in other cases.

In an action for specific performance of an agreement for the sale of land, the subject matter involved was held to be, not the price agreed on, but the value of the land as it stood at the time of filing the bill: *Kennedy v. Brown*, 12 C. L. J. 174.

It is not the value put upon the matter by either party, but the value as decided by the Court, that ascertains whether the case is within the jurisdiction: see *Taylor v. Addyman*, 13 C. B. 309.

In actions in the County Courts, the burden is always on the plaintiff of showing a cause of action within the jurisdiction, and where the relief sought involves matters which cannot be valued, the action should be brought in the High Court. If the County Courts had jurisdiction at all in such actions, it would be without limit: see *Whidden v. Jackson*, 18 A. R. 439, per Osler, J.A., at p. 442.

Where the plaintiff sought specific performance of an agreement to purchase a right of way and to build and maintain fences and crossings, although the purchase money and damages awarded were only \$187.24, it was held that the subject matter exceeded \$200, the right of the plaintiff to have fences and crossings made and maintained being involved: *Brough v. The Brantford, Norfolk and Port Burwell Ry. Co.*, 25 Gr. 43.

Where the plaintiff's right to the lateral support of the defendant's land was in question, and the judgment ordered the payment of \$40 damages and the restoration of the plaintiff's land, costs on the High Court scale were allowed: *Snarr v. Granite Curling & Skating Co.*, 1 O. R. 102.

In an action to restrain the defendants from closing up a roadway leading through their land to the plaintiff's lot, the value of the land taken was held not to be a test of the value of

the subject matter involved, as the plaintiff's right to have a road to his lot might be of great value: *Rae v. Trim*, 8 P. R. 405. See also *McAlpine v. Eckfrid*, 16 Gr. 595.

The limit put upon the jurisdiction by section 22, clause 2, is of importance in the class of cases dealt with by this clause.

14. In any action or contestation to establish the right of a creditor to rank upon an insolvent estate where the amount of such claim does not exceed \$400. 59 V. c. 19, s. 3.

An action of this nature was held not to be a personal action, and not within the jurisdiction of the County Courts under clause 1: *Whidden v. Jackson*, 18 A. R. 439.

See R. S. O. c. 147, ss. 21, 22 and 23, as to the proof of claims upon insolvent estates, and as to contesting same and bringing actions to establish the right to rank.

The provision of clause 2 of section 22, that the County Courts shall not have cognizance of any action where the assets of the estate or fund out of which the amount in question is payable exceeds \$1,000, does not affect the jurisdiction under this clause, as the Court does not decide upon any question of the amount payable out of the assets, but merely upon the right to rank and the amount of the claim.

24. If during the progress of any action or matter under clauses 9 and 10 of the last preceding section, it is made to appear to the Judge that the subject-matter exceeds the limit in point of amount to which the jurisdiction of the Court is therein limited, it shall not affect the validity of any proceedings already had or order already made, but unless an order is made under the next section it shall be the duty of the Judge by his order to transfer the action or matter to the High Court; and the procedure in the said action or matter after being so transferred shall be regulated by the rules of the Supreme Court of Judicature for Ontario. 59 V. c. 19, s. 4, part.

This section is similar to 51-52 V. c. 43, s. 68 (Imp.).

The provision validating any proceedings already had, or order already made, is important, as it allows an action to be transferred to the High Court, and to be proceeded with there made after judgment.

after judgment has been given. See Eng. County Court Rules, 1889, O. 33, R. 6. In actions brought under clauses 9 and 10, the amount of the subject matter involved will commonly appear only upon a reference after judgment.

If the excess of jurisdiction appears on the face of the proceedings, or is known to the plaintiff at the commencement of the action, he cannot obtain relief under this section: *Birks v. Silverwood*, L. R. 14 Eq. 101; 27 L. T. N. S. 18; *Thomson v. Flinn*, L. R. 17 Eq. 415; 29 L. T. N. S. 829.

As to transferring actions to the High Court generally, see sections 30-34.

When action may be continued in County Court.

25.—(1) Any party or person interested may upon notice to the other parties apply to a Judge of the High Court for an order authorizing and directing the action or matter to be carried on, continued and completed in the County Court, if such action or matter is beyond the jurisdiction of the County Court by reason only that the amount of the "joint stock or capital," or "deceased person's estate," mentioned and limited in clauses 9 and 10 of section 23 exceeds the sum of \$1,000 by an amount not exceeding \$500.

Order transferring in discretion of Judge.

2. If after hearing the parties or such of them as appear, the Judge is of the opinion that such excess will not prejudicially interfere with a proper trial or completion of the said action or matter in the said County Court, he may order that all subsequent proceedings in such action or matter shall be had and taken to completion (including the issue of execution and all proceedings thereon or thereafter) in the County Court as fully as though such Court had had jurisdiction *ab initio*, or that only certain of such proceedings to be mentioned in the order shall be so had in the County Court, and that thereafter the other proceedings shall be had in the High Court as to the said Judge appears meet and proper, and he may make such order as to the costs of the proceedings had before him as he deems just. 59 V. c. 19, s. 4, part.

Abandonment of so much of claim as is

26. Where it appears at any time before or during the trial that the claim of the plaintiff is in excess of the jurisdiction of the Court, the plaintiff in his discretion may be-

fore or during the trial by writing signed by him and filed, in excess upon such terms as the Judge deems proper as to costs and otherwise, abandon so much of his claim as is in excess of the jurisdiction of the Court. In such case the plaintiff shall forfeit such excess, and shall not be entitled to recover the same in any other action. 59 V. c. 19, s. 5.

This section is, no doubt, not intended to affect any other rights of abandonment a plaintiff may have.

Where the plaintiff's claim is in excess of the jurisdiction of the Court in which he desires to bring his action, he has always had the right to abandon before action so much of his claim as is in excess of the jurisdiction: *Longworth v. McKay*, 6 O. S. section 149; *In re McKenzie and Ryan*, 6 P. R. 323. Independently of any statutory provision a plaintiff may also be allowed to abandon a part of his claim, when it appears in the course of the action that the claim is beyond the jurisdiction, but only where the part sought to be abandoned is divisible from the rest of the claim: *Thomson v. Eede*, 22 A. R. 105; *Isaac v. Wyld*, 7 Ex. 163; *In re McKenzie v. Ryan*, *supra*; *Re Elliott v. Blette*, 21 O. R. 595; *Trimble v. Miller*, 22 O. R. 500; and on granting leave to a plaintiff to abandon a portion of his claim in the action, it is always made a condition that he shall also abandon his right to bring another action for such portion: *Thomson v. Eede*, *supra*. An abandonment in such a case may be allowed after the hearing of an appeal from the judgment in the action: *Thomson v. Eede*, *supra*; or after a motion for prohibition after judgment: *Re Elliott v. Blette*, *supra*; *Trimble v. Miller*, *supra*.

The right to abandon under this section is not restricted to the abandonment of a portion of the claim divisible from the rest, but it can be exercised only before or during the trial.

Where the plaintiff's claim is, on its face, beyond the jurisdiction, there is, it seems, no power to allow an abandonment for the purpose of bringing the claim within the jurisdiction: *Re Hopper v. Warburton*, 32 L. J. Q. B. 104; *Re McKenzie and Ryan*, 6 P. R. 323; *Sherwood v. Cline*, 17 O. R. 30; *Cleveland Press v. Fleming*, 24 O. R. 335.

The right to abandon is not confined to cases where the excess is in point of amount: *In re Walsh v. Ionides*, 1 E. & B. 383; *In re Kerkin v. Kerkin*, 3 E. & B. 399.

The abandonment should be made specifically in respect of the portion of the claim that is in excess of the jurisdiction: *In re Meek v. Scobell*, 4 O. R. 553.

It has been held that a plaintiff cannot abandon part of his claim in an action of tort: *Chapman v. Doherty*, 25 N. B. R. 271; see, however, *In re Meek v. Scobell, supra*, and *Thomas v. Hilmer*, 4 U. C. R. 527.

Where the claim was upon a bill of costs, part of which had been abandoned to give jurisdiction, and the Judge at the trial deducted a sum from the bill, it was held that the whole of this sum should not be deducted from the claim as sued, but that the amount abandoned should be considered: *Jarvis v. Leggatt*, 10 C. L. T. 155.

Abandonment must be the act of the plaintiff; The Judge cannot make an abandonment as an act of his own, nor can the plaintiff's solicitor. It must be the act of the plaintiff himself, or of some one with authority from him: *In re Hill*, 10 Ex. 726; 24 L. J. Ex. 137. An abandonment under the statute must be in writing, signed by the plaintiff and filed. Proper amendments should also be made in the pleadings. See *Thomson v. Eede*, 22 A. R. 105.

and must be express. An abandonment must be express. If a plaintiff sues for part only of his claim and recovers judgment, this is not of itself an abandonment of the balance, and another action may be brought for it: *Vines v. Arnold*, 8 C. B. 632; 19 L. J. C. P. 98; *Brunskill v. Powell*, 19 L. J. Ex. 362. But where the claim is indivisible, an action for a part is a bar to the whole; as where one serves another for a year under the same hiring, and brings an action for a month's wages, he cannot recover the balance in another action: *Davidson v. Belleville & North Hastings R. W. Co.*, 5 A. R. 315.

The mere suing on an account beyond the jurisdiction of the Court, and endorsing an abandonment on the writ, is not *per se* a bar to an action for the balance; judgment must be recovered upon such claim: *Winger v. Sibbald*, 2 A. R. 610.

Terms to be imposed In *re Hill*, 10 Ex. 726; 24 L. J. Ex. 137, it is said that when the Judge is called upon to give jurisdiction by allowing the plaintiff to abandon, he should do so only upon making the plaintiff pay the costs incurred up to that time by the opposite party, who may have appeared to contend that the Court had no jurisdiction. That rule probably will not apply to cases in the County Courts where there are pleadings which show the real matters in dispute between the parties: see *Thomson v. Eede, supra*.

Jurisdiction in actions for recovery of land. **27.**—(1) The several County Courts shall have jurisdiction in actions for the recovery of corporeal hereditaments (where the yearly value of the premises, or the rent

payable in respect thereof, does not exceed \$200) in the following cases, namely:

(a) Where the term and interest of the tenant of such corporeal hereditament has expired, or has been determined by the landlord or the tenant, by a legal notice;

(b) Where the rent of such corporeal hereditament is sixty days in arrear, and the landlord has the right by law to re-enter for non-payment thereof;

and in respect to such actions the said Courts shall have ^{Power in} and exercise the same powers as belong to and may be exercised by the High Court, in and in respect to actions for the recovery of land.

(2) The term "landlord," as used in this section shall ^{Landlord} _{defined.} be understood to mean the person entitled to the immediate reversion of the land; or if the property be holden in joint tenancy, coparcenary or tenancy in common, shall be understood to mean any one of the persons entitled to such reversion. R. S. O. 1887, c. 47, s. 20 (1, 3).

The jurisdiction under this section is not subject to the exceptions contained in section 22, and is, therefore, not ousted when a question of title is raised.

The County Courts have jurisdiction if either the rent or the yearly value does not exceed \$200: *In re Earl of Harrington*, *Harrington v. Ramsay*, 2 E. & B. 669; 22 L. J. Q. B. 460; 8 Ex. 879; 22 L. J. Ex. 326; *Fearon v. Nervall* (2), 5 D. & L. 445; 18 L. J. Q. B. 9; but see *Crowley v. Vitty*, 7 Ex. 319.

By the value of the premises is meant the actual marketable value of the land, not the value of the landlord's interest in it: *Elston v. Rose*, L. R. 4 Q. B. 4.

By the rent payable is meant the rent payable as between the litigant parties, and not any rent that may be paid by a sub-lessee, though the latter would be strong evidence of value: *Brown v. Cocking*, L. R. 3 Q. B. 672.

When the Judge of the County Court has decided the question of value on conflicting evidence his decision will not be reviewed on motion for prohibition: *Brown v. Cocking, supra*;

but prohibition may be granted when the Judge has found the value of the lands to be within the limits of his jurisdiction by valuing them upon a wrong principle: *Elston v. Rose, supra.*

What is
an expired
term.

Where the landlord has a right of re-entry in case of breach of a condition, the interest of the tenant does not expire upon breach of the condition; it merely becomes forfeitable at the option of the landlord. The statute refers to cases where the interest has expired by effluxion of time: *Friend v. Shaw, 20 Q. B. D. 374; 57 L. J. Q. B. 225; Burns v. Walford, W. N. (1884) 31; Mansergh v. Rimell, W. N. (1884) 34.* Where the tenant held the lands for a year, with the arrangement that if the lands were sold, he would give up possession at the end of the year, the lands having been sold, it was held that on the expiration of the year the term had expired: *Neads v. McMillan, 29 U. C. R. 415.*

Meaning
of legal
notice.

“Legal notice” means the notice required by law, and not one depending on the express stipulation of the parties; it means a notice where, certain circumstances having been established, the nature and character of the notice to quit follow as matter of law from the state of facts: *Friend v. Shaw, supra.* Where a lease provided for re-entry by the landlord for non-payment of rent or breach of the conditions of the lease, a notice to quit, pursuant to such provision, was held to be not a “legal notice”: *Ibid.*

The question whether the tenancy has been determined by a legal notice is one upon which the decision of the Judge of the County Court is conclusive: *Fearon v. Nowall (1), 17 L. J. Q. B. 161.*

The ordinary relation of landlord and tenant exists: *Jones v. Owen, 5 D. & L. 669; 18 L. J. Q. B. 8; Banks v. Rebbeck, 20 L. J. Q. B. 476; 2 L. M. & P. 452.*

The relation of landlord and tenant may be established between mortgagee and mortgagor by the mortgage deed, and in that case the term may be determined and the statute apply: *Daubuz v. Lavington, 13 Q. B. D. 347; Hall v. Comfort, 18 Q. B. D. 11.*

But even where the relation of landlord and tenant exists between mortgagee and mortgagor, the statute does not apply if the plaintiff seeks to enter as mortgagee: *Hobson v. Monk, W. N. (1884) 17.*

A purchaser from the original landlord is within the statute: *Neads v. McMillan, 29 U. C. R. 415.*

Place of
trial.

By section 36 (2), actions under this section must be brought in the County Court of the county where the premises lie.

28. Every County Court shall have legal and equitable Relief jurisdiction and shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant, in any action or proceeding in such Court such relief, redress or remedy, or combination of remedies, either absolute or conditional, including the power to grant vesting orders and to relieve against penalties and forfeitures, and shall in every such action or proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained) by and upon the same mode of procedure, and in as full and ample a manner as might and ought to be done in the like case by the High Court. 59 V. c. 19, s. 6; 60 V. c. 15, Sched. A (72).

The provision in the first part of this section, that every County Court shall have legal and equitable jurisdiction, was introduced by The County Courts Act, 1896. Prior to the passing of that Act it was held that the County Courts had no original equitable jurisdiction, and could not entertain an action of a purely equitable nature: see *Whidden v. Jackson*, 18 A. R. 439; *Re McGugan v. McGugan*, 21 O. R. 289; *Reddick v. Traders Bank of Canada*, 22 O. R. 449.

By virtue of this amendment the County Courts are now Courts of Law and Equity, and have jurisdiction over every cause of action, whether legal or equitable, coming within any of the classes of cases which the County Courts are empowered to entertain.

The balance of the section deals only with the powers of the County Courts in respect of actions within their jurisdiction. When the cause of action is within the jurisdiction of the County Court, it is to be dealt with in the same manner as would be done in the like case by the High Court.

Under this section a County Court may grant, in an action for damages, an injunction to restrain a continuance of the wrong: *Ex parte Martin*, 4 Q. B. D. 212; *ib.* 491; *Plummer v. Coldwell*, 15 P. R. 144; *Richards v. Cullerne*, 7 Q. B. D. 623.

So long as the sum claimed for damages is within the jurisdiction, the fact that the injunction may affect the defendant's property to an amount far beyond it has nothing to do with the power of the County Court to grant the injunction: *Ex parte Martin*, *supra*.

Specific delivery of chattel. In an action of detinue a County Court may order delivery of the specific chattel, without the option of payment of its assessed value: *Winfield v. Boothroyd*, 54 L. T. N. S. 574.

See also *McGregor v. McGregor*, 57 L. J. Q. B. 268.

Powers apply to both interlocutory and final orders. The question discussed in *Pryor v. The City Offices Co.*, 10 Q. B. D. 504, and in *Richards v. Cullerne*, 7 Q. B. D. 623, whether the corresponding section in regard to the County Courts in England applied to interlocutory proceedings, or only to the relief given as a result of the action, does not arise here.

This section provides that relief shall be granted by and upon the same mode of procedure as by the High Court, and by sections 40 and 41, and Consolidated Rule 1216, the practice and procedure in actions in the High Court shall extend and apply to actions in the County Courts. By section 45 the County Courts shall have the same powers to enforce their rules, etc., as the High Court possesses.

As to whether the County Courts have merely the powers possessed by the High Court at the time of passing this section, or such powers as the High Court may have from time to time, and as to the effect on the powers of the County Courts of a repeal of any of the powers of the High Court, see *Winfield v. Boothroyd*, 54 L. T. N. S. 574.

Duty of Courts where defence or counter-claim involves matters beyond jurisdiction.

29. Where in a proceeding before a County Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon such counter-claim. R. S. O. 1887, c. 47, s. 22.

Before this section was passed the County Courts could not adjudicate upon a defence or counter-claim involving matter in regard to which they could not entertain an action: *Russell v. Conway*, 5 U. C. R. 256. But where there was a set-off composed of several divisible claims, the defendant might prove his set-off up to the limit of the jurisdiction: *Russell v. Conway, supra*; *Read v. Wedge*, 20 U. C. R. 456.

This section allows the Court to dispose of the action so far as relates to the plaintiff's claim, although for that purpose it may have to deal with a defence or counter-claim which involves matters in respect of which an action could not be

brought in a County Court. But the defendant is to use such a counter-claim merely as a defence; he cannot obtain a judgment in respect of it for relief beyond the amount of the plaintiff's claim: *Davis v. Flagstaff Mining Co.*, 3 C. P. D. 228.

In an action for rent a defendant may plead that he is entitled to have the lease set aside, and, although the Court may not have jurisdiction to entertain an action to set aside the lease, it may give effect to the defence, and treat the lease as set aside for the purpose of determining the action for rent, but not with regard to its future effect: *Mostyn v. West Mostyn Coal & Iron Co.*, 1 C. P. D. 145; 45 L. J. C. P. 401; *Breslauer v. Barwick*, 36 L. T. N. S. 52; 24 W. R. 901.

A defendant does not by merely setting up the matter as a counter-claim in the County Court action abandon the balance of his claim, but may bring an action in the High Court on the same cause of action. In such case the defendant in the action in the High Court will be estopped by the judgment of the County Court from denying the cause of action, and the only question will be as to the amount of damages: *Webster v. Armstrong*, 54 L. J. Q. B. 236.

Section 186 of The Judicature Act, R. S. O. c. 51, provides as follows:—In any case in a County or Division Court where the defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, the High Court or any Judge thereof, may on the application of any party to the proceedings, order that the whole case be transferred from such Court to the High Court, and thereupon all the proceedings in such case shall be transmitted by the clerk or other proper officer of the County or Division Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the High Court as if it had been originally commenced therein.

The power given by this section is to transfer, not a part, but the whole proceeding: *Davis v. Flagstaff Mining Co.*, 3 C. P. D. 228, at p. 232.

The application to transfer should not be made *ex parte*: *Anon. W. N. (1876) 12.*

REMOVAL OF ACTIONS INTO HIGH COURT.

30.—(1) Where it appears in an action otherwise of the proper competence of the County Court that such Court has not cognizance thereof from the title to land beyond the value of \$200 being brought in question, or from the validity

When title to land beyond the value of \$200 is called in question.

of a devise, bequest or limitation under a will or settlement being disputed, and the devise, bequest or limitation exceeding in value \$200, or from the assets of the estate or fund out of which the amount in question is payable exceeding \$1,000, a Judge of the High Court or a Judge of the County Court before whom the cause is pending, may (subject to section 25 of this Act) direct the removal of the cause into the High Court; and the cause when removed into the High Court shall be proceeded with in the said Court in the manner provided by section 31 of this Act. 59 V. c. 19, s. 9.

Imposition
of terms
on grant-
ing order
for
removal.

(2) The Judge making the order may in his discretion make and impose terms on the party applying for the order as to payment of costs, giving security for debt or costs, or such other terms as he thinks fit.

Judge of
High
Court may
review
order for
removal
of County
Court
Judge.

Certain
cases may
be trans-
ferred to
the High
Court.

(3) Where the order is made by a Judge of a County Court, a Judge of the High Court sitting in Chambers at Toronto, may rescind the order, or vary the terms thereof or imposed thereby. R. S. O. 1887, c. 47, s. 23 (2, 3).

31.—(1) If it appears to a County Court or a Judge thereof that an equitable question raised in an action or other proceeding in such County Court, cannot be dealt with by the County Court so as to do complete justice between the parties, or may for any other reason be more conveniently dealt with in the High Court, the Court or Judge may order the action or proceeding to be transferred to the High Court; and the order of transference may be made by the Court or Judge *sua sponte*, or upon the application of either party on notice to the other parties interested, and may be made at any stage of the action or other proceeding.

Proced-
ings on
transer
to High
Court.

(2) Where an order is made under the preceding subsection, the proper officer of the County Court shall annex together all pleadings and papers filed with him, and transmit the same, together with the order of transference or a copy thereof, to such officer of the High Court as the order directs.

(3) Where a transfer has been made under this section On a transfer made to the High Court, and the Judges of the High Court and the officers thereof shall have the same powers and perform the same duties in relation thereto, and the rules and practice of the Supreme Court shall in all respects (or as nearly as may be) apply as if the suit had been originally instituted as an action, or proceeding in the High Court; but no further or other pleadings shall be necessary than the original pleadings in the Court from which the action or proceeding was transferred, unless specially ordered by the Court or a Judge. R. S. O. 1887, c. 47, s. 38.

32. Where it appears in an action brought in a County Court that such Court has not cognizance thereof from any cause other than those mentioned in section 30, a Judge of the High Court, or the Judge of the County Court before whom the action is pending, may order the action to be transferred to the High Court, and the proceedings thenceforward shall be as provided by sections 31 and 34 of this Act for like cases. 54 V. c. 14, s. 1.

33. Except in cases within the meaning of sections 24, 30, 31 and 32, or in cases where the defence or counter-claim involves matter beyond the jurisdiction of the County Court as provided in section 186 of The Judicature Act, no cause or action instituted in a County Court shall be removed or removable from such County Court, by order of *certiorari*, or otherwise, into the High Court unless the debt or damages claimed amount to upwards of \$100, and then only on affidavit and by leave of a Judge of the High Court, in cases which appear to the Judge fit to be tried in the High Court, and upon such terms as to payment of costs, giving security for debt or costs, or such other terms as he thinks fit. R. S. O. 1887, c. 47, s. 24.

34. In a case removed from a County Court to the High Court it shall not be necessary to deliver a new statement of claim, but the case shall proceed on the record as it stands. On removal case to proceed on the record as it stands.

when removed into the High Court, and all subsequent proceedings may be had and taken in the cause in the same way as if it had been originally commenced and prosecuted in the High Court. R. S. O. 1887, c. 47, s. 25.

Common
Law
right to
certiorari

Where there is no statutory provision it is the common law right of every party to an action in an inferior Court to have the action removed by *certiorari* to a superior Court: Symonds v. Dimsdale, 2 Ex. 533; Cherry v. Endean, 55 L. J. Q. B. 292; Hankey v. The Grand Trunk R. W. Co., 17 U. C. R. 472.

An action could only be removed, however, under this common law right where it was one properly within the jurisdiction of the inferior Court; "*certiorari* imports jurisdiction in the inferior Court": Meyers v. Baker, 26 U. C. R. 16; Ferguson v. Sampsey, 10 C. L. T. 110; O'Brien v. Welsh, 28 U. C. R. 394; and it could not be removed after verdict or judgment: Sherk v. Evans, 22 A. R. 242; Fox v. Veale, 8 M. & W. 126; Kemp v. Balne, 8 Jur. 619; Barnes v. Cox, 16 U. C. C. P. 236. There was also some question as to the right of a plaintiff to remove his own cause: see Dennison v. Knox, 3 P. R. 150; 9 U. C. L. J. 241, and Helps v. Lucas, 8 U. C. L. J. 184.

Effect of
preceding
sections.

The preceding sections affect this right in the following manner:

Sections 30 and 32 provide for the removal of actions which are beyond the jurisdiction of the County Courts.

Action
may be
removed
where ju-
risdiction
ousted.

Section 30 was primarily a provision for the relief of a plaintiff in an action which had been properly brought in a County Court, but in the course of which some question was raised that the Court could not try. It now includes, in addition, one class of cases that are not properly brought in the County Courts, viz.:—Actions where the assets of the estate or fund out of which the amount in question is payable exceed \$1,000.

Actions
not proper-
ly brought
in a
County
Court.

By section 32 the power to transfer is extended to any action of which the County Court in which it is brought has not cognizance from any cause. As recited in the preamble to the original statute, 54 V. c. 14, it is a provision for the relief of suitors who, under a misapprehension of law, bring actions in the County Courts which are not within their jurisdiction. This section applies not only to cases in which it is made to appear during the progress of the suit that there is no jurisdiction, but also to cases where the absence of jurisdiction is apparent on the face of the claim: see Whidden v. Jackson, 18 A. R. 439, which was removed to the High Court under this provision. But

where a plaintiff brings an action in a County Court, knowing that it is beyond the Court's jurisdiction, but misstating the facts to make it appear that there is jurisdiction, he may not be entitled to relief under this section: see *Thomson v. Flinn*, L. R. 17 Eq. 415. Where the action is one that might properly be brought in the County Court of a particular county, but is brought in another County Court, it may be transferred to the High Court under this section: *Howard v. Herrington*, 20 A. R. 175.

Section 33 is restrictive, and takes away the common law right to have an action removed to a superior Court. A party is no longer entitled as of right to remove an action to the High Court, but, except in cases otherwise provided for, can only do so by leave of a Judge of the High Court, in cases where the debt or damages claimed amount to upwards of \$100, and which appear to the Judge fit to be tried in the High Court: *Cherry v. Endean*, 55 L. J. Q. B. 292.

The expression "fit to be tried in the High Court" means a case which ought to be tried there, or which is more fit to be tried there than in a County Court: *Banks v. Hollingsworth*, (1893) 1 Q. B. 442.

In *Meyers v. Baker*, 26 U. C. R. 16, it was doubted whether a replevin action could be one in which the debt or damages claimed amount to upwards of \$100.

Section 31 is of later date than section 33, and applies to Removal cases that would otherwise be subject to the restrictions of that section. It was enacted in 36 V. c. 8, which provided that a plaintiff might proceed by action at law for the recovery of any purely money demand, although his right might be only an equitable one. It applies to cases involving equitable questions that cannot be properly dealt with by a County Court; but an action cannot be removed under this section unless it is within the jurisdiction of the County Court: *Re McGugan v. McGugan*, 21 O. R. 289.

Besides these sections, section 24 makes special provision for transferring actions brought under clauses 9 and 10 of section 23, which are found to be beyond the jurisdiction in point of amount; and section 186 of The Judicature Act, noted under section 29, provides for transferring actions in which the defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court.

Except in cases within section 24, the transfer is made, as at common law, for the purpose of trial, and cannot be made after verdict or judgment: *Sherk v. Evans*, 22 A. R. 242.

Transfer
can be
made only
before
judgment.

Where a removal is sought on the ground that the case is a fit one to be tried in the High Court within the meaning of section 33, the application must not be delayed until the trial when the opinion of the Judge of the County Court is obtained: *In re Knight v. Medora and Wood*, 11 O. R. 138; *Holmes v. Reeve*, 5 P. R. 58.

To whom
the ap-
plication
is to be
made.

The application under sections 30 and 32 may be made either to a Judge of the High Court or to a Judge of the County Court.

An order under section 33 can be made only by a Judge of the High Court. By consent of parties the Master in Chambers may exercise the same jurisdiction as a Judge in Chambers in the removal of causes from inferior Courts: Consolidated Rule 42 (17). An order under section 31 can be made only by a County Court or a Judge thereof.

Appli-
cation may
be made
ex parte.

The application may be made *ex parte* unless otherwise provided; the fact that it may be proper to impose terms does not make it necessary to give notice: *Symonds v. Dimsdale*, 2 Ex. 533. But all the facts must be disclosed on the application so that terms may be imposed: *Parker v. The Bristol and Exeter R. W. Co.*, 6 Ex. 184; 20 L. J. Ex. 112.

Imposing
terms.

A writ of *certiorari* is not to be issued, but the order shall have the same effect as a writ formerly had: see Consolidated Rule 1101, and Form 136. Under sections 31 and 32 a simple order that the action be transferred and that the papers be transmitted to a specified officer of the High Court would be sufficient, sub-section 2 of section 31 giving directions as to the mode of transferring.

Except in cases within sections 30 and 33, no power is given the Judge ordering the transfer to impose terms, or to direct how the costs of the proceedings already taken in the action shall be disposed of; such costs come under the control of the High Court: *Sherk v. Evans*, 22 A. R. 242; *Hares v. Lea*, L. R. 10 Eq. 683. But the costs of the order to transfer may, probably, be disposed of by that order: see *Corley v. Roblin*, 5 U. C. L. J. 225; *Kerr v. Cornell*, 1 C. L. J. 326. And the orders of the Judge of the County Court made in the progress of the action disposing of the costs of interlocutory proceedings before him are valid: *Re Sessions v. Dell*, Divl. Court, 8th February, 1898.

Venue.

In ordering the removal of an action to the High Court, the Judge cannot change the venue: *Patterson v. Smith*, 14 U. C. C. P. 525.

Although the further proceedings in the action must be taken in the office to which the papers are transmitted, the venue need not be laid in the same county: *Chambers v. Chambers*, 3 U. C. L. J. 205.

The action remains in the County Court until the papers have been transmitted as directed by the order: *D'Errico v. Samuel*, (1896) 1 Q. B. 163; *Welply v. Buhl*, 3 Q. B. D. 253; 47 L. J. Q. B. 151; *David v. Howe*, 27 Ch. D. 533; 53 L. J. Ch. 1053. until paid. But even where the County Court has jurisdiction, no further steps should be taken in the cause there, after the order to transfer: *D'Errico v. Samuel*, 75 L. T. N. S. 59.

Notice of trial in the High Court cannot be given until that Court is in possession of the cause: *Riach v. Hall*, 11 U. C. R. 356.

The transfer is a step in the cause: *Batt v. Price*, 1 Q. B. D. 264.

When the action has been transmitted no jurisdiction remains in the County Court: *Moody v. Steward*, L. R. 6 Ex. 35; 19 W. R. 161; *Harris & Sons v. Judge*, (1892) 2 Q. B. 565. The Judge of the County Court has then no power to rescind or set aside the order to transfer made by him: *Mahen v. Nicholls*, 31 U. C. C. P. 22; *Doll v. Howard*, 10 Man. L. R. 635; 32 C. L. J. 165. mitted.

Where one defendant had died and had no representative at the time the order to transfer was made, and the order was on that account irregular, it was held that the whole action had, nevertheless, been transferred: *Duke v. Davis*, (1893) 2 Q. B. 107.

The action, when transferred, is to proceed on the pleadings delivered in the County Court. But for this express provision it would be necessary to deliver new pleadings: see *Hankey v. The Grand Trunk R. W. Co.*, 17 U. C. R. 472.

As to all subsequent proceedings the parties are in the same position as if the action had been commenced in the High Court, rules as to and the ordinary rules as to costs apply: *Struthers v. Green*, 14 P. R. 486.

But where the plaintiff recovers a sum within the jurisdiction of an inferior Court, the fact that the action was removed into the High Court by the defendant may be a reason for allowing full costs to the plaintiff: *Pellas v. Breslauer*, L. R. 6 Q. B. 438.

Unless terms are imposed the defendant's costs are allowed on the scale of the High Court, although he had the action transferred: *Corley v. Roblin*, 5 U. C. L. J. 225.

Where the defendant had given notice of his objection to the jurisdiction, and an order to transfer was made at the hearing in the County Court, it was held that, on the final disposition of the costs of the action, the plaintiff should bear the costs of the hearing before the County Court Judge: *Ward v. Wyld*, 5 Ch. D. 779.

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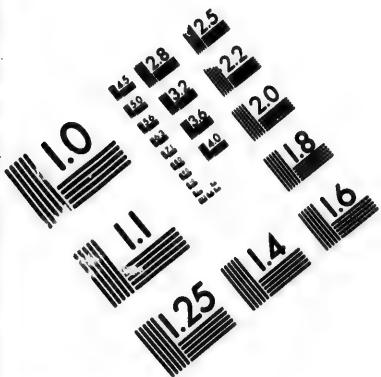
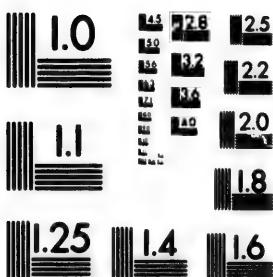
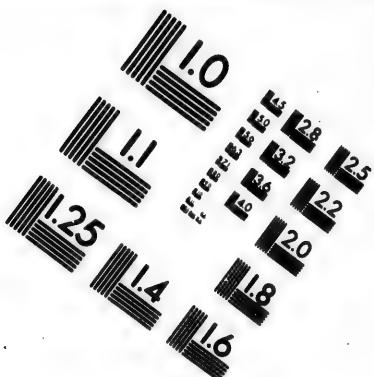
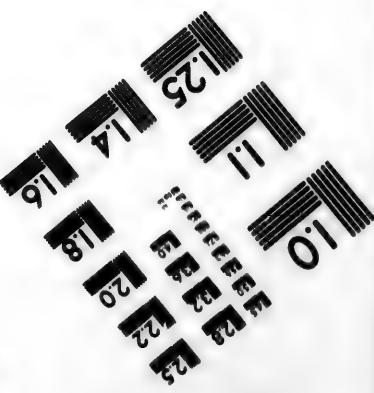


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Where the defendant gave notice of motion for prohibition, and the plaintiff thereupon had the action transferred to the proper Court, the defendant was given the costs of his motion: *Re Olmstead v. Errington*, 11 P. R. 366.

COSTS IN CASES TRANSFERRED.

35. Subject to rules, where an action is transferred under section 31, the fees and disbursements shall be paid and the solicitors' costs taxed according to the lower scale tariff of the High Court. R. S. O. 1887, c. 47, s. 39.

There is now no lower scale tariff of the High Court, and by Consolidated Rule 1178 costs in the High Court are to be taxed and allowed according to Tariff A; and by Consolidated Rule 1179 the fees and disbursements payable upon proceedings in the High Court shall be those set forth in Tariff B.

PLACE OF TRIAL IN CERTAIN CASES.

36.—(1) Actions under clause 8 of section 23 of this Act shall be brought and tried in the county where the land is, and actions under clause 9 of the said section shall be brought and tried in the county where the partnership had or has its principal place of business, and actions under clause 10 of the said section shall be brought and tried in the county where letters probate or of administration have issued, or where the deceased resided at the time of his death, unless by consent of the parties, or unless the place of trial is changed. 59 V. c. 19, s. 10.

(2) Actions under section 27 of this Act shall be brought in the County Court of the county in which the premises sought to be recovered lie. R. S. O. 1887, c. 47, s. 26 (2).

The jurisdiction is affected by this section.

The matter dealt with by this section is not a mere matter of practice, but one of jurisdiction. If an action of any of the classes mentioned is brought in the County Court of any county other than that designated, that Court will have no more jurisdiction than if such actions were never allowed to be brought in a County Court: *Howard v. Herrington*, 20 A. R. 175; *Ferguson v. Howick*, 25 U. C. R. 547. The venue cannot be changed to the proper county; the only remedy is to remove the action to the High Court: *Howard v. Herrington, supra*.

Where an action is brought in disregard of this section, a defendant does not waive the objection by appearing and defending: *Mayor of London v. Cox*, 36 L. J. Ex., at p. 233.

Where the action is for the recovery of land not wholly Land within any one county, it cannot be brought in a County Court: situate in different counties. see *McCrea v. Easton*, 19 C. L. J. 331.

Besides the actions mentioned in this section, there are certain other actions which can be brought only in some specified County Court: see as to actions of replevin, section 23, clause 5; other actions against a Justice of the Peace, section 22, clause 5; inter- pleader matters, section 23, clause 6.

Except when otherwise provided, a plaintiff may issue his writ in any county: Consolidated Rule 121; *Mahon v. Nicholls*, 31 U. C. C. P. 22. The action must, of course, proceed in the Court where the writ is issued, and the venue be laid and a trial county had there, unless an order changing the venue is obtained under Consolidated Rule 1219.

That rule is as follows:—"In all actions brought in a County Court the Judge of the County Court where the proceedings were commenced, or the Master in Chambers (subject to appeal in either case, as if the case were in the High Court), may change the place of trial according to the practice in force in the High Court; and in the event of an order being obtained for that purpose, the Clerk of the County Court in which the action was commenced shall forthwith transmit all papers in the action to the Clerk of the County Court to which the place of trial is changed, and all subsequent proceedings shall be entitled in such last mentioned Court, and carried on in such last mentioned County as if the proceedings had originally been commenced in such last mentioned Court."

The rule seems in terms to permit only one change of venue in any case.

The place of trial is to be changed according to the practice in force in the High Court, and the motion is to be disposed of on the same principles as in actions in the High Court: *Mahon v. Nicholls*, 31 U. C. C. P. 22; *Slater v. Purvis*, 10 P. R. 604. See Consolidated Rule 529, as to the place of trial in actions in the High Court.

The policy of the law in regard to venue in County Court actions is similar to that laid down by the Rules for the High Court, and each county should bear the expense of its own litigation: *Callanan v. Springer*, 32 C. L. J. 336.

An application to the Master in Chambers under this rule is not a proceeding in the High Court: *Bingham v. McKenzie*, 10

proceeding in the High Court. P. R. 406. The papers should be intituled in the County Court: *Ferguson v. Golding*, 15 P. R. 43; *Mahon v. Nicholls*, 31 U. C. C. P. 22.

Where an application to change the venue has been dismissed, a second application for the same purpose, not based upon any new state of facts arising since the first application was made, will not be entertained by another officer having co-ordinate jurisdiction: *Cameron v. Elliott*, 17 P. R. 415.

Appeal from order under Rule 1219. The order, whether made by the County Court Judge or by the Master in Chambers, is subject to appeal as if the case were in the High Court: see formerly *McAllister v. Cole*, 16 P. R. 105; *Milligan v. Sills*, 13 P. R. 350.

By Consolidated Rule 767 an appeal lies from an order of the Master in Chambers to a Judge of the High Court in Chambers. Where the order has been made by the Judge of the County Court, an appeal is, probably, to be taken as if the case were in the High Court, and the order had been made by a Judge of the High Court. To construe the rule as giving an appeal as from an order in a case in the High Court, made by a County Court Judge under Rule 45, would make it inapplicable to the County Court of York. But *quaere* whether the same appeal is not intended as when the Master makes the order. An appeal lies from a Judge of the High Court in Chambers to a Divisional Court under Rule 777.

The costs of the motion when made before the Master in Chambers are County Court costs, and may be taxed with the other costs of the cause. The costs of an appeal under this Rule are, probably, costs of a proceeding in the High Court and should be taxed there, and payment enforced there: see *D'Errico v. Samuel*, 75 L. T. N. S. 59; *Parks v. Pittendrigh*, 34 C. L. J. 282.

Any motion against an order changing venue should be made before the papers have been transmitted in pursuance of the order: *Mahon v. Nicholls*, 31 U. C. C. P. 22; *Doll v. Howard*, 10 Man. L. R. 635; 32 C. L. J. 165.

When papers transmitted no jurisdiction remains. When the papers have been transmitted no jurisdiction over the action remains in the County Court in which the action was commenced: *Mahon v. Nicholls*, *supra*. But until the order has been acted upon and the papers transmitted, the action remains and may be tried in the county where it is brought: *Hornby v. Hornby*, 3 U. C. R. 274; and see *Welply v. Buhl*, 3 Q. B. D. 253; 47 L. J. Q. B. 151; *David v. Howe*, 27 Ch. D. 533; 53 L. J. Ch. 1053.

Notice of trial cannot be given in anticipation of a change of venue: *Riach v. Hall*, 11 U. C. R. 356.

PLEADING AND PRACTICE.

37. An action by or against a Judge or Junior Judge Where of a County Court which is within the competence of a against County Court, may be brought in the County Court of any Judge of County Courts county adjoining that in which such Judge or Junior Judge may be resides. R. S. O. 1887, c. 47, s. 26.

A Judge cannot sit on a case in which he has such an interest that it may give him a real bias in the matter. The interest need not be pecuniary, but it must be substantial: The Queen v. Meyer, 1 Q. B. D. 173.

Where a County Court Judge refused to act in a matter brought before him on the ground that one of the parties alleged upon affidavit that he was interested, mandamus was refused: In re the Judge of the County Court of Elgin, 20 U. C. R. 588.

The rule is that an action may be brought in the County Court of any county, but section 36 makes some exceptions to this rule, and in the notes to that section it is pointed out that certain other matters can be brought only in some particular County Court. It is to such cases that this section applies. Formerly such actions were brought in the Superior Court and full costs were allowed: Jones v. Wing, 3 O. S. 36.

Where on account of the office of Judge of the County Where Court being vacant, an action within the jurisdiction of such office of County Court is brought in the High Court, costs on the High Judge vacant. Court scale will not be allowed unless there are peculiar circumstances requiring an immediate commencement of the action: Sutherland v. Tisdale, 1 C. L. Ch. R. 213; and see Jennings v. Dingman, T. T. 4 & 5 V.

Section 2 of The Creditors' Relief Act provides that when the Judge is disqualified to act the Judge of the County Court of an adjoining county shall have jurisdiction to act in his place.

38. When it is intended by a pleading to bring into question the title to land, or to any annual or other rent, Pleading want of duty or other custom or thing, relating to or issuing out of jurisdiction. lands or tenements of greater value than \$200, or to dispute the validity of any devise, bequest or limitation exceeding \$200 under any will or settlement or when it is intended by any pleading to exclude the jurisdiction of the Court upon

the foregoing or upon any other ground it shall be so expressly stated in the pleading, and the matter relied on for that purpose shall also be set out in the pleading. 59 V. c. 19, s. 11.

General rule as to pleading want of jurisdiction.

Cases within this section.

In all cases where a defendant intends to object to the jurisdiction of the Court he should in his pleading, state the facts sufficiently to show that the Court has no jurisdiction: see Bullen & Leake's Precedents of Pleadings, 4th Ed., Part II., p. 239.

This section makes special provision for cases that are within the jurisdiction, until a pleading is put in that raises some question of title to land, or some other question that the Court cannot try. It applies only to such pleadings as directly and manifestly raise such a question. See O'Brien v. Welsh, 28 U. C. R. 394; Heaton v. Cornwall, 4 P. R. 1.

Failure to comply with this section will not give jurisdiction to try the action in which the question is raised, but it may be a ground for striking out the pleading: Seabrook v. Young, 14 A. R. 97; Campbell v. Davidson, 19 U. C. R. 222.

Taking issue on pleading want of jurisdiction.

39. Issue may be taken on any such pleading or reply may be made or a summary application may be made to the Judge to determine whether the jurisdiction of the Court is by such pleading *bona fide* brought in question. If the Judge is of opinion that the jurisdiction of the Court is not so brought in question he may direct the pleading to be amended or to be struck out. Where the Judge is of opinion that the jurisdiction of the Court is properly and *bona fide* brought in question by any pleading he may order that the cause be transferred to the High Court. 59 V. c. 19, s. 12.

Prior to The County Courts Act, 1896, the jurisdiction was at once ousted when a question was raised upon the pleadings that the Court could not try: O'Brien v. Welsh, 28 U. C. R. 394; Powley v. Whitehead, 16 U. C. R. 589. There was no jurisdiction to enquire into the good faith of the plea, but with every such pleading there was required to be filed an affidavit that it was not pleaded vexatiously, nor for the mere purpose of excluding the Court from jurisdiction: see R. S. O. 1887, c. 47, s. 27.

Action may be removed at once to the High

It is optional with a plaintiff whether he will have the Judge of the County Court determine whether the jurisdiction is *bona fide* brought in question. He may have his action at once removed to the High Court under section 30, or under the present

section, the action may be carried on in the County Court until the Judge has decided, either at the trial or upon a summary application, that the jurisdiction is properly and *bona fide* brought in question by the pleading. Court; or may be continued in the County Court.

If there are disputed facts, or if there is a question as to the proper inference from undisputed facts, the jurisdiction is *bona fide* brought in question: *Re Moberly v. The Town of Collingwood*, 25 O. R. 625. Where a question of title is raised, the Judge cannot decide on the title itself, but merely on the good faith of the party raising the question: *Regina v. Davidson*, 45 U. C. R. 91; *Sewell v. Jones*, 1 L. M. & P. 525; 19 L. J. Q. B. 372.

The Judge must, however, inquire into the matter until it appears by the evidence that there is a *bona fide* dispute: *Hebling v. Duggan*, 1 C. L. T. 108. He must proceed until he has received such evidence as would be proper to submit to a jury. If the facts lead to only one conclusion and that against the defendant, there is no *bona fide* dispute: *Re Moberly v. The Town of Collingwood, supra*; *In re Emery and Barnett*, 4 C. B. N. S. 423.

There must be a fair and reasonable claim of right: *Watkins v. Major*, L. R. 10 C. P. 662. Where the defendant claimed the lands in question as owner, and swore that he believed he owned them, but had not paid for them and had no conveyance, and was not in possession, he was held not to have shown reasonable grounds to satisfy the Judge of his good faith: *Lilley v. Harvey*, 5 D. & L. 648; 17 L. J. Q. B. 357.

Where the defendant has not made out a good *prima facie* claim, the strength of the plaintiff's case as to his claim is material as negativing the claim of the defendant: *Reece v. Miller*, 8 Q. B. D. 626.

40. Subject to the provisions of The Judicature Act and to Rules of Court, the pleadings, practice and procedure for the time being of the High Court shall apply and extend to the County Courts, wherever the pleadings, practice and procedure of the County Courts corresponded with those of the Superior Courts of Law, prior to the passing of the Ontario Judicature Act, 1881, and the rules, orders and forms applicable to similar cases and under similar conditions in the High Court shall apply to all actions, suits or proceedings, had, instituted or pending under the additional jurisdiction given by The County Courts Act, 1896, to County

Procedure in County Courts.

Courts unless and until additional or other rules applicable to such cases are made. R. S. O. 1887, c. 47, s. 28; 59 V. c. 19, s. 13.

Section 59 provides that the Judges of the Supreme Court and of the High Court may make Rules of Court with respect to the County Courts.

Practice of High Court to apply. Rule 1216 of The Consolidated Rules, 1897, provides:—These Rules, and the practice and procedure in actions in the High Court of Justice, shall apply and extend to actions in the County Courts.

The Consolidated Rules were not made by the Judges of the Supreme Court or of the High Court, but were prepared by Commissioners appointed under 58 V. c. 13, s. 42, and approved by the Lieutenant-Governor in Council under that statute. R. S. O. c. 51, s. 129, also relates to these Rules.

The proper way to apply the Rules of Practice to the County Court procedure is to adapt the spirit of the Rules to the constitution of the County Courts in place of reading them with rigid regard to the letter: *Williams v. Crow*, 10 A. R. 301; *Ferguson v. McMartin*, 11 A. R. 731.

The following matters of practice may be specially mentioned here:—

Rules 1212-1223 relate exclusively to County and Local Courts.

Money in Court. Rules 1221-1223 provide for the payment of money into Court and its withdrawal, and for keeping accounts. It is to be noticed that by Rule 1221 (2), an order of the Court or a Judge thereof is necessary to obtain payment out of money in Court in all cases.

Trial of non-jury actions at Toronto. Rule 542, as to non-jury actions to be tried at Toronto, does not apply to the County Court of York.

Moving against interlocutory orders. A County Court Judge sitting in Term has no power to reconsider his own order made in Chambers, by analogy to the practice in the High Court under Rule 777 of appealing to a Divisional Court: *Baird v. Hunter*, 31 C. L. J. 663.

Security for costs. By Rule 1199 (3), in actions in the County Courts the amount of security for costs to be given under a *præcipe* order shall be \$200. Where partial security is given for the purpose of moving for judgment under Rule 603, the amount of the partial security in actions in the County Courts shall be \$25: Rule 1209 (3).

Solicitors cannot act as Barristers. The Judge of a County Court cannot allow a solicitor to practice as a barrister before him in the County Court: *In re Brooke*, 10 U. C. L. J. 49; *The Queen v. Erridge*, 3 U. C. L. J. 32.

The Judge of a County Court cannot set up a general rule of practice to be observed in his Court, contrary to the Rules of Practice provided by the Legislature: *Regina v. The Judge of the Marylebone County Court*, 34 Sol. Jur. 459; *In re Oliver v. Fryer*, 7 P. R. 325.

41. The several County Courts may set aside verdicts or nonsuits, and grant new trials, and such Courts and the Judges thereof may set aside judgments by default, and proceedings for irregularity, grant time for any pleading, and order stay of proceedings till security is given for costs, and may issue summonses and make orders in all matters of practice in like manner and on the like principles and grounds, and to the same extent as the High Court, or the Judges thereof in the said Court, and may cause rules on sheriffs, or any other rules, orders or proceedings thereupon to be served in any county. R. S. O. 1887, c. 47, s. 29.

Where there is no express provision such as this section contains, the rule is that an inferior Court cannot set aside a verdict upon the merits or grant a new trial; but for matters of irregularity where the proceedings have been contrary to the practice and rules of the Court, or for misconduct of the jury, or for fraud, a verdict or judgment may be set aside and a new trial granted: *Comyns's Digest*, Tit. Courts (Q.); *Rex v. Mayor of Oxford*, 3 Nev. & M. 877; *Stewart v. Moore*, 9 U. C. L. J. 82; *Re Forbes v. Michigan Central R. W. Co.*, 20 A. R. 584, at p. 587.

A County Court can grant a new trial only on such grounds as would be sufficient in a case in the High Court: see *Murtagh v. Barry*, 24 Q. B. D. 632; and Consolidated Rule 1217. See also Consolidated Rule 785, which places same restrictions on the granting of new trials, and Consolidated Rule 786 which provides for ordering a new trial on any question in an action without interfering with the finding or decision upon any other question.

By Consolidated Rule 615, upon a motion for a new trial, the Court may give final judgment in the action if satisfied that it has before it all the necessary materials: *Weaver v. Sawyer*, 16 A. R. 422; *McConnell v. Wilkins*, 13 A. R. 438; *Williams v. Crow*, 10 A. R. 301; *Stewart v. Rounds*, 7 A. R. 515.

See section 51 as to the cases in which an application for a new trial must be made to the County Court.

Where an application had been made to the Judge of a County Court to set aside a partition made by him under The Partition Act, it was held that the proceedings had terminated

and the Judge had no jurisdiction in the matter other than that set forth in the Act and could not set aside his order, even for fraud: *Jenking v. Jenking*, 11 A. R. 92.

A County Court has inherent power over its own process to prevent its abuse: *Re Mitchell v. Scribner*, 20 O. R. 17; *Cocker v. Tempest*, 7 M. & W. 502.

COSTS WHERE NO JURISDICTION.

Costs where action fails for want of jurisdiction.

42. In all actions or other proceedings brought in a County Court in which the plaintiff fails to recover judgment by reason of such Court having no jurisdiction over the subject-matter thereof, the County Court shall have jurisdiction over the costs of the action, or other proceeding, and may order by and to whom the same shall be paid, and the recovery of the costs so ordered to be paid may be enforced by the same remedies as the costs in actions or proceedings within the proper competence of the said Court are recoverable. R. S. O. 1887, c. 47, s. 30.

The same provision is contained in Consolidated Rule 1215.

But for this provision the County Courts, being inferior Courts, would have no jurisdiction over the costs of the action or proceeding, where they have no jurisdiction over the subject matter: *Re Cosmopolitan Life Association*, 15 P. R. 185.

Where the plaintiff fails to recover judgment by reason of the Court having no jurisdiction over the defendant, costs may be awarded: *Empire Oil Company v. Vallerand*, 17 P. R. 27.

Where an appeal from the judgment of a County Court is allowed on the ground of want of jurisdiction, the appellate Court cannot make an order as to the costs of the action; the power to make such order is in the County Court: *Sherk v. Evans*, 22 A. R. 242; *Powley v. Whitehead*, 16 U. C. R. 589. But where an appeal from a County Court is quashed on the ground that there is no jurisdiction to hear the appeal, the costs of the appeal may be disposed of by the appellate Court: *Teskey v. Neil*, 15 P. R. 244.

By R. S. O. c. 76, s. 1, where a Judge has jurisdiction as *persona designata*, he shall have the same jurisdiction as to costs as in matters under his ordinary jurisdiction: see formerly *Re Young*, 14 P. R. 303. That statute, however, applies only where the Judge has jurisdiction in the matter, and the present section does not apply to such proceedings, but only to actions and proceedings in Court: *Re Cosmopolitan Life Association*, 15 P. R. 185.

EXECUTION.

43. The County Courts may issue writs of execution ^{Writs of execution.} against goods and lands, and writs of *capias ad satisfaciendum* against the person, in like cases, upon the same terms, and in the same order, as similar writs may be issued in the High Court. R. S. O. 1887, c. 47, s. 31.

Consolidated Rules 835, *et seq.*, provide for issuing writs of execution in the High Court.

By R. S. O. c. 80, s. 8, the High Court and the County Courts are given power to issue writs of *capias ad satisfaciendum*; and by section 1 the Judge of a County Court may make an order for arrest either in his own Court or in the High Court.

By R. S. O. c. 66, s. 3, the Judge of a County Court may make an order for the attachment of the property of an absconding debtor; and by section 2 he may make such an order in a case in the High Court.

44. The County Courts may issue writs of execution ^{Writs of execution, etc., may run into other counties.} against the person, lands or goods, writs of subpoena, rules on the sheriff, and all other rules, orders and proceedings into any other county, to be served or executed therein; and Judges' summonses and orders may be issued in like manner; and all such writs, rules, summonses, orders and proceedings shall be of equal force and effect, and as binding as if the same had been issued from the Court, or by the Judge of the county to or into which they are so issued, and all subsequent proceedings thereupon shall be carried on in the Court in which the action has been brought or the judgment entered. R. S. O. 1887, c. 47, s. 32.

Rule 146 of The Consolidated Rules provides that a writ of summons may be served in any county or district in Ontario.

Rule 327 is as follows:—

Unless otherwise provided by statute or Rule of Court, pleadings and notices required to be served in any action, whether in the Supreme Court of Judicature or County Courts, may be served in any part of Ontario.

And by Rule 1213, it is provided that "the County Courts may issue writs of *subpoena ad testificandum*, to enforce the attendance of any witnesses resident within Ontario, and also writs

of *subpoena duces tecum*, to enforce the attendance of and the production of deeds and papers by any such witnesses; and may proceed against persons who, having been duly served with a *subpoena*, disregard or disobey the same, with the same powers, in like manner and by the same mode of proceeding as belongs to and is practised in the High Court."

The County Courts have had power to issue process into any county in the Province since 13-14 V. c. 52. Prior to that statute their process was not effectual beyond the county in which it was issued.

In *Rustin v. Bradley*, 28 O. R. 119, it was held that the County Court of York could order a sale of lands situate in the county of Peel.

POWER TO ENFORCE RULES.

Power to enforce rules.

45. The several County Courts shall have and exercise the same powers to enforce their rules, regulations and directions as the High Court possesses, and may punish by fine or imprisonment, or by both, for any wilful contempt or resistance to their regular process, rules or orders; but the fine shall in no case exceed \$100, nor shall the imprisonment exceed six months. R. S. O. 1887, c. 47, s. 33.

All Courts of Record have, at common law, the power to fine and imprison for any contempt committed in the face of the Court; but the County Courts, being inferior Courts, would, but for this section, have no power to fine or imprison for any contempt not so committed: *The Queen v. Lefroy*, L. R. 8 Q. B. 134.

A County Court may enforce its interlocutory as well as its final orders by committal: *Ex parte Martin*, 4 Q. B. D. 212; *Ibid.* 491; *Richards v. Cullerne*, 7 Q. B. D. 623.

High Court may intervene.

The High Court may examine the proceedings for the purpose of preventing any usurpation of jurisdiction by the County Court, and if a committal has been made without reasonable grounds the High Court will set it aside: *Ex parte Lees and the Judge of the County Court of the County of Carleton*: 24 U. C. C. P. 214. But the High Court cannot review the facts and examine into the truth of the case: *In re Clarke and Heermans*, 7 U. C. R. 223; *Young v. Saylor*, 23 O. R. 513, at p. 526.

If there was anything from which the Judge might reasonably infer that a wilful insult had been offered him, the High Court cannot go behind his decision that there has been a contempt: *Regina v. Jordan*, W. N. (1888) 152.

Where a person is in custody on process issued in an action in a County Court, a writ of *habeas corpus* should not be issued for the purpose of inquiring into the proceedings: *Re Anderson v. Vanstone*, 16 P. R. 243.

Prior to the statute 56 V. c. 13, the Judge of a County Court, Powers of when acting under a statute as *persona designata*, could not order Judge an attachment for disobedience of his orders: *Re Pacquette*, ^{acting as} *persona* ^{designata}, 11 P. R. 463.

R. S. O. c. 76 now provides:—

1. Where jurisdiction has been or shall be given by any Act to a Judge as *persona designata*, he shall be deemed to have jurisdiction therein as a Judge of the Court to which he belongs, and he is to have the same jurisdiction for enforcing his orders and judgments and as to proceedings generally, and as to costs and otherwise, as in matters under his ordinary jurisdiction as a Judge of the Court in which he is such Judge, so far as a different mode is not directed by the statute giving him the jurisdiction aforesaid.

2. Every order of a Judge of the High Court made under statutory authority as aforesaid, may be filed at Toronto in the central office of the High Court of Justice, or in an outer county with a local registrar, deputy registrar, or deputy clerk of the Crown, and every order of a Judge of a County or District Court made under said statutory authority may be filed with the clerk of the Court, and upon an order being so filed, the same shall become and be an order of the High Court of Justice or of the County or District Court as the case may be, and may be enforced in the same manner and by the like process as if the order had been made by the said Court.

3. There shall be payable at the time of filing such order the like fees as would be payable upon the issue of an order made by a Judge of the High Court or County or District Court, as the case may be, in the exercise of his ordinary jurisdiction.

4. Every order so filed shall be entered in the same manner as a judgment of the Court in which the order is so filed.

5. The costs of every proceeding before a Judge of the High Court or of a County or District Court under this Act, shall be in the discretion of such Judge.

ACCOUNTS AND INQUIRIES.

46. Where it is proper to direct a reference, the Court References or Judge may make such reference to the Master in Ordinary of the Supreme Court or to any of the Local Masters or to

the Clerk of the Court, and where the Judge of the Court is Local Master the reference may be made to himself as such Master, but no reference to take accounts or make inquiries shall be directed at the sittings of the Court where such accounts or inquiries can be conveniently taken or made at such sittings; and no reference shall be directed at any time, unless where a reference is necessary, if such reference will increase the cost of the proceedings. 60 V. c. 15, s. 2.

This section was substituted for R. S. O. 1887, c. 47, s. 34, which had been enacted to provide for references in actions brought under 36 V. c. 8, s. 2, allowing a purely money demand of an equitable nature to be recovered by action at law. In view of the equity jurisdiction conferred on the County Courts by The County Courts Act, 1896, it was desirable to increase their powers to order a reference and this section was passed. It is probably to be taken merely as a provision for references in cases where it is the practice of a Court of Equity to direct a reference, and not as affecting the power to refer matters under The Arbitration Act.

Power on
such order

47.—(1) Where an order is made under the preceding section the Master or clerk to whom the reference is directed shall proceed therein, and all rules as to the powers of the Master, and as to the proceedings in the Master's office, shall apply thereto. R. S. O. 1887, c. 47, s. 35; 59 V. c. 19, s. 7.

Rules 654-766 of the Consolidated Rules relate to proceedings on references to Masters and Referees.

Costs of
reference.

(2) Upon every reference under the preceding section the fees to be paid and the costs to be allowed, whether as between party and party, or solicitor and client, shall be in accordance with the lower scale tariff of the High Court. 59 V. c. 19, s. 8.

The Consolidated Rules, 1887, do not provide any lower scale tariff for the High Court. When this section was enacted the lower scale tariff of the High Court was that provided by Rule 1219 of The Consolidated Rules, 1888.

Report to
be filed.

48. Where the Master or clerk has made his report pursuant to the order, the same shall be filed with the officer of the Court with whom the pleadings are filed; and the report shall, without an order confirming the same, become absolute

at the expiration of fourteen days after the filing thereof, when it unless previously appealed from, but the Court or a Judge ^{shall} ~~become~~ ^{absolute.} may, under special circumstances, allow an appeal after the fourteen days. R. S. O. 1887, c. 47, s. 36; 59 V. c. 19, s. 7.

Rule 700 of The Consolidated Rules provides that on the conclusion of proceedings before a Master he shall annex together all the papers in the action or matter before him and transmit the same to the office in which the proceedings were commenced, to be deposited with the other papers in the action or matter.

Rule 694 provides that any party affected by a report may file the same and shall forthwith thereafter give notice of filing.

The report becomes absolute at the expiration of fourteen days after the filing thereof, not at the expiration of fourteen days from the date of service of notice of filing, as in the High Court under Rule 769.

The report is appealed from within fourteen days if notice of appeal is given within that time: *Ex parte Saffery*, 5 Ch. D. 365; *Christopher v. Croll*, 16 Q. B. D. 66.

49. The appeal from a report referred to in the preceding section shall be to a Judge in Chambers or to the Court; but when the appeal is taken to the Court, the notice of appeal shall be returnable not later than the fourth day of the County Court sittings next after the filing of the report. R. S. O. 1887, c. 47, s. 37.

The County Court sittings referred to in this section are the sittings in lieu of terms provided for by section 14.

By Consolidated Rule 771 the notice of appeal shall be a seven clear days' notice, setting out the grounds of appeal, and shall be returnable within one month from the date of service of notice of filing of the report unless otherwise ordered. Where the appeal is to the Court, the notice of appeal shall be returnable not later than the fourth day of the next sittings, as directed by the statute, and not within one month, as in the Rule.

As to appealing from the decision of the Judge or the Court upon an appeal from a report, see section 52.

The Arbitration Act, R. S. O. c. 62, also provides for references in actions in County Courts, as follows:—

Section 37. In a County Court, the Judge thereof may make an order to refer in the same manner, with the same effect and with the same powers, as may be exercised by the High Court in any cause therein.

Sections 28 and 29 deal with references by the High Court in actions pending there:—

28. Subject to Rules of Court and to any right to have particular cases tried by a jury, the Court or a Judge may refer any question arising in any cause or matter for inquiry and report to a Judge of a County Court, or to any official referee, or to a special referee agreed upon by the parties.

29. In any cause or matter—

- (a) If all the parties interested who are not under disability consent; or
- (b) If the cause or matter requires any prolonged examination of documents, or any scientific or local investigation, which cannot, in the opinion of the Court or a Judge, conveniently be made before a jury, or conducted by the Court or Judge directly; or
- (c) If the question in dispute consists wholly or in part of matters of account,

the Court or a Judge may at any time order the whole cause or matter, or any question or issue of fact arising therein, or question of account, to be tried either before a Judge of a County Court or before a special referee agreed on by the parties, or before an official referee.

Section 141 of the Judicature Act provides who shall be official referees.

Powers of referees.

Section 30 of The Arbitration Act provides for the powers and remuneration of referees. See also Consolidated Rules 648-651.

Filing report.

Section 31. The report of an official or special referee under the three next preceding sections may be filed by any party forthwith after the same shall have been made, and upon notice of the filing thereof having been given to the other parties, it shall from the time of service of such notice have the effect of and be subject to all the incidents of a report of a Master as regards confirmation, appealing therefrom, motions therefrom and otherwise. See also Consolidated Rule 653.

By section 32 the evidence of witnesses examined upon a reference, together with the exhibits therein referred to, shall forthwith after the making of the report be transmitted by the referee to the proper officer of the Court, that is, to the clerk in County Court cases.

Report becoming absolute.

The report becomes absolute, without an order confirming the same, at the expiration of fourteen days from the time of service of notice of filing, unless notice of appeal is served within that time. See Consolidated Rule 769.

Section 38. In a County Court in which an order of reference is made, an appeal, in like manner and within the same from time as in like cases is provided with regard to actions in the High Court, shall lie to the Judge of the County Court, who shall upon such appeal have the same powers as may be exercised by a Judge in like cases in the High Court.

By section 33, the appeal from a report may be heard and decided by a Judge sitting in Court, and the practice to be observed upon such appeal shall be in other respects the practice observed on appeals from the report of a Master. Consolidated Rule 771 provides for giving notice of appeal, and for setting down an appeal from the report of a Master.

By section 34 an appeal from a report shall not be made after the expiration of fourteen days from the filing thereof, and appealing, the giving notice of such filing to the opposite party, unless under special circumstances the Court or a Judge shall allow an appeal after the fourteen days.

By Consolidated Rule 652 the Court may require explanations or reasons from the referee or remit the matter to him or any other referee, and upon an appeal the Court may decide the question referred to the referee on the evidence taken before him, either with or without additional evidence.

Section 39. An appeal shall lie from any order, judgment or decision of the County Court Judge to a Divisional Court of the High Court, and the proceedings and practice on the appeal as to staying proceedings, and otherwise, shall be similar to the proceedings and practice relating to appeals from County Courts to a Divisional Court.

APPEALS FROM COUNTY COURTS.

50. The terms "party to a cause or matter," and "appellant," hereinafter used, shall include persons suing or being sued in the name of others, though not mentioned in the record, and persons on whose behalf or for whose benefit any action is prosecuted or defended, as well as parties named in the record. R. S. O. 1887, c. 47, s. 40.

"Party" shall include every person served with notice of or attending any proceeding, although not named on the record. R. S. O. c. 51, s. 2 (8).

A person brought into a garnishment matter as the person entitled to the fund attached is a "party" within section 52: Henderson v. Rogers, 15 P. R. 241.

Appeals to
Divisional
Courts.

51.—(1) Any party to a cause or matter in a County Court may appeal to a Divisional Court of the High Court of Justice from any judgment directed by a Judge of the County Court to be entered at or after the trial in any case tried without a jury, and also in any case tried with a jury, to which sub-section 4 does not apply.

Motion to
County
Court for
new trial
or other
judgment.

(2) Instead of appealing to a Divisional Court of the High Court of Justice any party may move before the County Court within the first two days of its next quarterly sittings to set aside the judgment and enter any other judgment upon any ground.

Moving
for new
trial on
discovery
of new
evidence.

(3) A motion for a new trial on the ground of discovery of new evidence or the like, shall be made before the County Court.

Where
there
has been a
trial with
a jury.

(4) Where there has been a trial with a jury any motion for a new trial, whether made for that relief alone or combined with, or as an alternative for any other relief, shall be made to the County Court.

Party
moving
County
Court not to
appeal
to High
Court.

(5) If a party moves before a County Court under sub-section 2 in a case in which he might have appealed to the High Court he shall not be entitled to appeal from the judgment of the County Court to the High Court, but the opposite party shall be entitled to appeal therefrom to the High Court. 58 V. c. 13, s. 44 (1); 60 V. c. 15, Sched. A (69).

Appeals
after trial.

This section provides for appeals from judgments at or after trial in the following manner:—

Without
jury.

In non-jury actions:

1. A motion may be made, upon any ground, before the County Court, to set aside the judgment and to enter any other judgment.

2. An appeal may be taken to a Divisional Court in any case except where a new trial is sought on the ground of the discovery of new evidence or the like, in which case the motion shall be made before the County Court.

With jury

In jury actions:

A motion may be made before the County Court, or an appeal may be taken to a Divisional Court as in actions tried

without a jury, except that any motion for a new trial, whether made for that relief alone or combined with, or as an alternative for any other relief, shall be made to the County Court.

Where there is a general judgment against several defendants they cannot appeal to different Courts, but must all appeal to the tribunal to which the defendant taking the first step has appealed: *Hately v. Merchants' Despatch Company*, 4 O. R. 723.

The sittings of the County Court at which the motion is to be made are the sittings held under section 14.

The motion may be made before or on either of the first two days of the next quarterly sittings, but it cannot be made later: *Norton v. McCabe*, 12 P. R. 506; and see Consolidated Rule 1214.

A motion against a judgment or for a new trial shall be upon a two clear days' notice, and the motion shall be set down at least one clear day before the first day of the sittings for which the notice is given unless otherwise ordered: Consolidated Rule 1218.

On setting down the motion a copy of the evidence must be left for the use of the Court.

By Rule 790, a party who serves a notice of motion and does not set the motion down shall be deemed to have abandoned the same; the notice of motion may also be countermanded, and, in either case, the opposite party is entitled to the costs of the motion, and may tax the same without an order. If the costs are not paid within four days from taxation, an order may be obtained on praecipe for payment.

Motions against judgments and for new trials in actions in the County Courts shall be disposed of upon the like grounds and principles as in the High Court: Consolidated Rule 1217. See also section 41; and *Murtagh v. Barry*, 24 Q. B. D. 632.

Upon a motion before a County Court for a new trial, final judgment may be given if the Court is satisfied that it has before it all the materials necessary for determining the questions in dispute: Consolidated Rule 615; *Weaver v. Sawyer*, 16 A. R. 422; *McConnell v. Wilkins*, 13 A. R. 438; *Williams v. Crow*, 10 A. R. 301; *Stewart v. Rounds*, 7 A. R. 515.

If a party moves before a County Court in a case in which he might have appealed to the High Court, he cannot appeal from the judgment of the County Court upon such motion, but the opposite party may appeal therefrom to a Divisional Court.

Appealing from judgment of County Court on motion against a judgment.

The party opposing the motion before the County Court may appeal from the judgment thereon, although it is merely an order for a new trial: *Cantelon v. Thompson*, 28 O. R. 396.

No appeal where the motion is for a new trial.

Where the motion is one that must, under sub-sections 3 or 4, be made before the County Court, neither party can appeal from the judgment on the motion, to a Divisional Court. This section gives no further appeal in such cases, and section 52 does not apply, because, special provision having been made by this section, an appeal lies only as here provided: *Brown v. Carpenter*, 27 O. R. 412; *Weaver v. Sawyer*, 16 A. R. 422.

A motion for a new trial is an interlocutory proceeding, and that may be a further reason for holding section 52 inapplicable to the decision thereon: *Jacobs v. Dawkes*, 35 W. R. 649.

Section 74 of The Judicature Act provides that there shall not be more than one appeal in this Province from any judgment or order made in any action or matter, save only at the instance of the Crown in a case in which the Crown is concerned, and save in certain other cases specified.

Appeal where County Court sets aside judgment, and enters another judgment.

Where a party moves for a new trial, and the County Court on such motion awards him judgment in the action, as it has power to do under Consolidated Rule 615, the case will probably be considered one in which he might, instead of moving for a new trial, have appealed to the High Court, and in that case the opposite party will be entitled, under sub-section 5, to appeal to the High Court.

No appeal from Divisional Court.

No appeal lies in a County Court case to the Court of Appeal from the judgment of a Divisional Court: *McVeain v. Ridler*, 17 P. R. 353.

Appeals from decision of Judge.

52.—(1) An appeal shall also lie to a Divisional Court of the High Court of Justice, at the instance of any party to a cause or matter from every decision made by a Judge of a County Court under any of the powers conferred upon him by any rules of Court or any statute, unless provision is therein made to the contrary; and from every decision or order made by a Judge of a County Court sitting in Chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts and proceedings against garnishee; and from every decision or order made in any cause or matter disposing of any right or claim, provided always that the decision or order is in its

nature final and not merely interlocutory. R. S. O. 1887, c. 47, s. 42; 58 V. c. 13, s. 44 (2); 59 V. c. 18, Sched. (48); c. 19, s. 14.

(2) This section shall not apply where jurisdiction is given to the Judge of the County Court as *persona designata*. 56 V. c. 13, s. 6.

This section provides for appeals in three classes of cases:—

1. From every decision made by a Judge of a County Court, under any of the powers conferred upon him by any Rules of Court or any statute, unless provision is therein made to the contrary;

2. From every decision or order made by a Judge of a County Court sitting in Chambers under the provisions of the law relating to interpleader proceedings, the examination of debtors, attachment of debts and proceedings against garnishees;

3. From every decision or order made in any cause or matter disposing of any right or claim.

To all three classes there is a proviso that the decision or order is in its nature final and not merely interlocutory: Hunter v. Hunter, 18 C. L. T. 114; Baby v. Ross, 14 P. R. 440.

There is a further proviso, in consequence of R. S. O. c. 76, s. 6, that the order has not been made by a Judge acting as *persona designata*.

The section includes orders of the Court as well as orders of the Judge: see Ferguson v. McMartin, 11 A. R. 731; Henderson v. Rogers, 15 P. R. 241. But as to the matters dealt with by section 51, that section is a complete provision: Weaver v. Sawyer, 16 A. R. 422; Brown v. Carpenter, 27 O. R. 412.

The word "interlocutory" in this section has not its usual meaning of "interlocutory." force as designating all the steps in an action intermediate between the initial and final proceeding in the litigation; an appeal is expressly given in respect of matters that are clearly interlocutory with reference to the original action, but are final adjudications upon the rights involved, as garnishee and interpleader proceedings. See Whiting v. Hovey, 12 A. R. 119, per Patterson, J.A.

It is sufficient that the order is, in its nature, final. So it was held that an order for immediate judgment under Rule 80 of The Judicature Act was appealable, and that the rule laid down in Standard Discount Co. v. LaGrange, 3 C. P. D. 67; Salaman v. Warner, (1891) 1 Q. B. 734, and other cases, that no order

is final which does not at once affect the status of the parties for whichever side the decision may be given, is not applicable to this section: *Bank of Minnesota v. Page*, 14 A. R. 347; *Rural Municipality of Morris v. London and Canadian L. & A. Co.*, 19 S. C. R. 434, per Patterson, J.

An order disposing of one of several matters in question in an action is a final order: *Re Alexander*, (1892) 1 Q. B. 216.

An order adjudicating upon the rights of the parties, but directing an inquiry as to damages, is a final order: *Shaw v. St. Louis*, 8 S. C. R. 385; *The Queen v. Clark*, 21 S. C. R. 656; *Ex parte Moore*, 14 Q. B. D. 627.

As to appealing from the judgment of a County Court Judge on an appeal to him from the report made upon a reference under The Arbitration Act, see section 39 of that Act, *ante*, under "Accounts and Inquiries."

Where on an application by a legatee to be allowed to continue an action, it was decided that a later will than that under which she claimed was null and void, and had not revoked the first will, this judgment was held to be final, as the decision upon the validity of the will would remain as *res judicata* between the parties: *Baptist v. Baptist*, 21 S. C. R. 425.

An order committing a judgment debtor to gaol for concealing or making away with property to defraud his creditors is a final order; but an order dismissing an application for the discharge of a defendant arrested under a *ca. re.* is interlocutory: *Baby v. Ross*, 14 P. R. 440. But by Consolidated Rule 1047 any order made by a County Court Judge on an application by a defendant to be discharged out of custody when arrested under an order for arrest, may be discharged or varied by a Divisional Court. See *McVeain v. Ridler*, 17 P. R. 353; *Elliot v. McCuaig*, 13 P. R. 416.

An order setting aside a default judgment and all proceedings in the action is a final order, but where the judgment only is set aside, and the parties are at liberty to prosecute the action, the order is interlocutory: *Schroeder v. Rooney*, 11 A. R. 673.

An order perpetually restraining the plaintiffs from proceeding, but reserving leave to apply, is not final: *Maritime Bank of Canada v. Stewart*, 20 S. C. R. 105.

An order setting aside a judgment on the application of a creditor, on the ground that the action was brought before the debt was due, is a final order: *Bowerman v. Phillips*, 15 A. R. 679.

An order setting aside and staying execution on a judgment, and virtually depriving the plaintiff of the right of recovering the amount of his judgment, is final: *Wallace v. Bos-som*, 2 S. C. R. 488.

An order imposing terms upon a defendant, as a condition to setting aside a default judgment, is merely interlocutory: *O'Donnell v. Guinane*, 28 O. R. 389; followed in *Nesbitt v. Malone*, Divisional Court, 10th January, 1898; but see *McVicar v. McLaughlin*, 16 P. R. 450.

An order dismissing defendant's application to set aside a writ of summons served out of the territorial jurisdiction of the Court is interlocutory: *Martin v. Moore*, 18 S. C. R. 634.

An order dismissing a motion for immediate judgment is interlocutory: *Fiskin v. Stewart*, 17 C. L. T. 82.

An order enlarging, until after the happening of a named event, defendant's motion to dismiss the action for want of prosecution is not final: *Slater v. Mader*, 17 C. L. T. 83.

An order dismissing a petition to vacate and set aside a partition is final: *Jenking v. Jenking*, 11 A. R. 92.

An order approving of the sale *en bloc* of the assets of a company in the course of winding up proceedings, is final: *In re The D. A. Jones Company*, 19 A. R. 63.

An order quashing an interim injunction is interlocutory: *Stanton v. Canada Atlantic R. W. Co.*, 21 C. L. J. 355.

Appeals have been entertained under this section from the following orders: An order refusing to appoint a receiver of insurance moneys payable to a judgment debtor: *Osler v. Muter*, 19 A. R. 94. An order setting aside a judgment obtained by transcript from a Division Court: *Molsons Bank v. Mc-Meekin*, 15 A. R. 535. An order allowing execution to issue on a judgment, which, it was contended, had been satisfied, and barred by the Statute of Limitations: *Mason v. Johnston*, 20 A. R. 412; and see *McMahon v. Spencer*, 13 A. R. 430.

Under the clause allowing an appeal from the decision of a Judge under powers conferred upon him by any Rules of Court or any statute, an appeal may be taken from the order as to costs at the trial: *McDermid v. McDermid*, 15 A. R. 287; *Mitchell v. Vandusen*, 14 A. R. 517; *Weaver v. Sawyer*, 16 A. R. 422. Although the costs are in the discretion of the Judge under Consolidated Rule 1130, yet an appeal will be allowed where there has been any violation of principle, or the Judge has proceeded on a wrong general rule, or the discretion of the Judge has been exercised under any misapprehension of fact: *Wansley v. Smallwood*, 11 A. R. 439, at p. 449; *Knickerbocker Company v. Ratz*, 16 P. R. 191.

An appeal does not lie from the Judge's order on an appeal from taxation: *Routledge v. Graham*, Divisional Court, 14th September, 1837.

An appeal lies under this section from an order for the examination of a transferee of property of a judgment debtor: *Goodeve v. White*, 15 P. R. 433; also from an order committing a judgment debtor for not attending for further examination: *Re Anderson v. Vanstone*, 16 P. R. 243.

Meaning
of "right"
or claim.

The "right or claim" mentioned in this section is that which forms the subject of the action, not the right to take any particular piece of procedure in the course of the action: *McPherson v. Wilson*, 13 P. R. 339. An order which does not deal with the final rights of the parties, but merely directs how the declarations of right already given in the final judgment are to be worked out, as an order allowing a set-off of costs, is merely interlocutory: *Blakey v. Latham*, 43 Ch. D. 23.

Where
Judge acts
*as persona
designata*
no appeal
unless
expressly
given.

Where jurisdiction is given by any Act to a Judge as *persona designata*, it is provided by R. S. O. c. 76, s. 6, as follows: There shall be no appeal from the order of a Judge made as aforesaid, unless an appeal is expressly authorized by the statute giving the jurisdiction.

As to the question generally, whether the jurisdiction given by any statute is given to the Judge as *persona designata*, or as the deputy of the Court, see *In re Allen*, 31 U. C. R. 458; *Re Waldie and Village of Burlington*, 13 A. R. 104; *Canadian Pacific R. W. Co. v. Little Seminary of Ste. Thérèse*, 16 S. C. R. 606.

Orders
made un-
der R. S.
O. c. 147.

The Judge of a County Court acting under R. S. O. c. 147—An Act respecting Assignments and Preferences by Insolvents—acts as *persona designata*: *Re Pacquette*, 11 P. R. 463; *Re Young*, 14 P. R. 303. That statute gives no appeal from the orders of the Judge.

Order
amending
plan.

An appeal lies from the order of a Judge of a County Court amending a plan under section 110 of The Registry Act, R. S. O. c. 136, to the Court of Appeal.

Order un-
der R. S.
O. c. 222

By section 27 of The Joint Stock Companies' Winding-up Act, R. S. O. c. 222, any party who is dissatisfied with any order or decision of the Court in any proceeding under the Act, may appeal therefrom to the Court of Appeal, or to any one of the Judges thereof.

Proceed-
ings
against
overhold-
ing tenants

Where a writ of possession has been issued under The Act respecting Overholding Tenants, R. S. O. c. 171, the proceedings may be set aside by a Divisional Court under section 6. The papers should be brought before the Court by *certiorari*: *Re Magann and Bonner*, 28 O. R. 37.

The order of the Judge of a County Court made in Chamber cannot be reconsidered by himself in term, although such order is interlocutory and is not appealable to a Divisional Court: *Baird v. Hunter*, 31 C. L. J. 663.

53. An appeal may be had from any appealable decision of a County Court Judge, notwithstanding judgment has been signed thereon. R. S. O. 1887, c. 47, s. 43, part; 58 V. c. 13, s. 44 (3).

Before this provision was made, it was held that no appeal could be had from a judgment directed to be entered, after the judgment had been signed: *Murphy v. The Northern R. W. Co.*, 13 U. C. C. P. 32; *Wood v. Grand Trunk R. W. Co.*, 16 U. C. C. P. 275.

Consolidated Rule 793 now provides that the papers to be certified to the High Court under section 55 shall include the judgment or order appealed from as well as the written opinion or decision of the Judge.

54. On an appeal the Divisional Court may set aside any judgment which may have been directed to be entered or may have been signed, and direct any other judgment to be entered or direct a new trial to be had and make any other order as to such Court may appear requisite and just. 58 V. c. 13, s. 44 (4).

Consolidated Rule 498 is as follows:

(1) In all appeals, either to the Court of Appeal or to the High Court or a Judge, or hearings in the nature of appeals, on all motions to set aside a verdict or finding of a jury, and to set aside or vary a judgment, the Court or Judge appealed to shall have all the powers and duties as to amendment and otherwise of the Court, Judge or officer appealed from, and full discretionary power to receive further evidence upon questions of fact; such evidence to be either by oral examination before the Court or Judge appealed to, or as may be directed.

(2) Such further evidence may be given without special leave as to matters which have occurred after the date of the judgment, order or decision from which the appeal is brought.

(3) Upon appeals from a judgment, order or decision given upon the merits at the trial or hearing of any cause or matter, such further evidence (save as aforesaid) shall be admitted on special grounds only, and not without the special leave of the Court.

Motion to quash appeal must be made to Divisional Court.

Cross-appeal necessary.

Order where no jurisdiction in County Court.

Pleadings, etc., to be certified.

In County Court appeals, a Divisional Court has not all the powers formerly exercised by the Court of Appeal by virtue of 45 V. c. 6, s. 7. Where an appeal did not lie, an order quashing the proceedings might be made by a Judge of the Court of Appeal in Chambers. Now an order striking out an appeal can be made only by the Divisional Court.

The Court of Appeal could also exercise its powers, although the appeal was only as to part of the judgment, and relief might be given to a party who had not appealed or complained of the judgment: see *Hutson v. Valliers*, 19 A. R. 154. A Divisional Court cannot grant relief to a respondent without a cross-appeal: *Spears v. Harnden*, 17 C. L. T. 84.

By Consolidated Rule 1217, motions against judgments and for new trials in actions in the County Courts shall be disposed of upon the like grounds and principles as in the High Court.

Where an appeal from the judgment of a County Court is allowed on the ground of want of jurisdiction in the County Court, an order is not made dismissing the action, but the judgment is set aside, and the case put where it was before the County Court undertook to try it. The County Court then has jurisdiction over the costs of the action, under section 42, while the Divisional Court has not; or the case may be removed to the High Court: *Sherk v. Evans*, 22 A. R. 242; *Powley v. Whitehead*, 16 U. C. R. 589.

55. The Judge shall at the request of the appellant, certify under his hand to the proper officer of the High Court the pleadings in the cause, and all motions, rules or orders made, granted or refused therein, together with the Judge's charge and the judgment or decision on the same, and, where a trial has been had, the evidence and all objections and exceptions thereto, and all other papers in the cause affecting the questions raised by the appeal. R. S. O. 1887, c. 47, s. 51, part; 58 V. c. 13, s. 44 (5).

Consolidated Rule 793 is as follows:—

(1) In appeals from County Courts, the pleadings, motions, orders and other papers to be certified to the proper officer of the High Court under section 51 of the Act respecting County Courts, shall include:

(a) The original pleadings;

(b) Notices of motion, and orders affecting questions raised by the appeal;

(c) The judgment or order appealed from and the written opinion or decision of the Judge;

Also where a trial has been had;

(d) The Judge's notes, or, where the evidence has been taken by a stenographer, his notes of the evidence and of any objections and exceptions thereto, and of the rejection of any evidence, and of the Judge's charge.

(e) The exhibits put in at the trial.

(2) The said papers shall be fastened together and transmitted to the central office, and the same shall be returned to the County Court when the appeal is disposed of.

(3) It shall not be necessary to certify or transmit the evidence or the objections or exceptions thereto, where the appeal is from a judgment or decision upon the pleadings, or upon a motion not founded upon the evidence.

The appeal is not lodged until the High Court has received Divisional Court has no jurisdiction until it has received papers. the papers certified by the Judge of the County Court, and the appeal cannot be dismissed, nor can the time for setting it down be extended; the case remains in the County Court, and the judgment complained of may be enforced: *Gilmor v. McPhail*, 16 P. R. 151; *Ryan v. James*, 13 N. B. R. 408. The respondent cannot be allowed costs for appearing to oppose the appeal if the proceedings have not been certified: *Ryan v. James, supra*.

The Judge is to certify only at the request of the appellant. This should be done before setting down the appeal and obtaining a certificate of setting down under Rule 797.

The Judge who is to certify is the Judge who tried the case: *Ryan v. James*, 13 N. B. R. 407.

Mandamus will be issued to compel the Judge to certify the proceedings for appeal when he improperly refuses: *Regina v. Wells*, 17 U. C. R. 545. But where the Judge refused to certify on the ground that the time for appealing had expired, mandamus was refused: *Orr v. Barrett*, 9 C. L. T. 72; and see *In re Keenahan v. Preston*, 21 U. C. R. 461. But where the objection is one that may be dealt with by the appellate Court, the papers should be sent up: *Gilmor v. McPhail*, 16 P. R. 151. In that case the time for appealing had expired, but the Court of Appeal had power to extend it; as to the power of a Divisional Court to extend the time for appealing, see under section 57.

If the proper papers are not certified, the appeal will not be heard: *Morse v. Thompson*, 19 U. C. C. P. 94. A certificate that the papers contain "the evidence in substance" is not

sufficient: *Winnipeg Water Works Co. v. Winnipeg Street Railway Co.*, 6 Man. L. R. 614. A *certiorari* may be issued to the Judge to return the full proceedings: *Robinson v. Richardson*, 32 U. C. R. 344.

It is not a valid objection that the Judge's certificate does not state that the papers are certified "to the High Court": *Baby v. Ross*, 14 P. R. 410.

The "judgment or decision" mentioned in the statute is not the formal judgment or order, but the Judge's opinion, or his grounds of decision: *Penton v. The Grand Trunk R. W. Co.*, 28 U. C. R. 367; *Hayward v. The Grand Trunk R. W. Co.*, 32 U. C. R. 392. Rule 793 (c) requires the judgment or order, as well, to be certified, but section 53 appears to recognize a right to appeal before the entry of any formal judgment.

Where one of the parties dies pending the appeal, proceedings to revive the action are properly taken in the County Court: *Blair v. Asselstine*, 15 P. R. 211; and see *Blakeway v. Patteshall*, (1894) 1 Q. B. 247.

Certifying proceedings under s. 52.

56. In appeals under section 52, the Judge shall only be required under the next preceding section to certify the motions, rules, orders, affidavits, evidence and other materials, necessary for the full understanding of the matter in appeal, together with his judgment or decision on the same. R. S. O. 1887, c. 47, s. 45.

Setting down appeals.

57. The appeal shall be set down for argument at the first sittings of a Divisional Court of the High Court of Justice which commences after the expiration of one month from the judgment, order or decision complained of, and the Divisional Court shall give such order or direction to the Court below, touching the judgment to be given in the matter, as the law requires; and shall also award costs to either party in its discretion, which costs shall be certified to and form part of the judgment of the Court below; and upon receipt of the order, direction and certificate, the Court below shall proceed in accordance therewith. R. S. O. 1887, c. 47, s. 52, part; 58 V. c. 13, s. 44 (6).

Costs.

The Consolidated Rules provide as follows:—

794. Subject to the next following rule, any Judge of the County Court appealed from may, upon application to him, stay

Staying proceedings in Court below.

proceedings in the action to enable the appeal to be brought upon such terms and for such time as may seem just.

795. The appeal shall be set down to be heard at latest two clear days before the first sittings of a Divisional Court, which commences after the expiration of 30 days from the decision complained of, and where the motion or appeal is founded upon the evidence, at or before the time of setting down, the appellant shall deliver to the proper officer two copies of the evidence certified as correct for the use of the Judges.

796. The appellant shall, at least seven days before the sittings at which the appeal is to be heard, serve the respondent with notice of hearing and the reasons of appeal.

797. Where notice of hearing of the appeal has been given, and the appeal has been set down to be heard, and notice thereof signed by one of the registrars of the High Court has been given to the sheriff where execution is in his hands, the execution of the judgment or order appealed from shall be stayed pending the appeal, unless otherwise ordered by the Divisional Court or a Judge of the High Court, or by a Judge of the County Court appealed from; and the order may be on such terms as the Court or Judge applied to thinks fit.

The stay granted under Rule 794 is a stay of proceedings in the action, while under Rule 797 it is only the execution of the judgment or order that is stayed.

Consolidated Rule 116 provides:—

(1) Unless otherwise ordered, sittings of Divisional Courts shall commence on the first Monday of each month (except during the Long and Christmas vacations); and shall continue to sit for two weeks (except on Saturdays and public holidays, and on any days falling in any vacation), unless the business before the Court is sooner disposed of.

(2) Where the first Monday in a month falls in any vacation, the sittings shall commence on the first Monday after the expiration of such vacation; and where the first Monday in the month is a public holiday, the sittings shall commence on the first judicial day thereafter.

Rule 118 provides that all business before a Divisional Court shall be set down in the registrar's office.

It is to be noticed that Rule 795 requires that the appeal shall be set down for the first sittings which commences after the setting down. Time for expiration of 30 days from the decision complained of, and not one month as in the statute.

The time runs from the decision, not from the drawing up of the judgment or order.

May be extended,

Under Rule 353 a Divisional Court may extend the time fixed by the Rules for setting down an appeal and giving notice of hearing; and where there has been no wanton delay the time will be extended as a matter of course, but the application should not be made until the proceedings have been certified under section 55: *Gilmour v. McPhail*, 16 P. R. 151.

but not beyond the time fixed by the Act.

No power is given to extend the time for setting down beyond the period fixed by the statute, and if the appeal is not set down for argument at the sittings there mentioned, a Divisional Court will have no jurisdiction to hear the appeal: *Wheeler v. Gibbs*, 3 S. C. R. 374; *Owen v. Sprung*, 28 O. R. 607; *The News Printing Co. v. Macrae*, 26 S. C. R. 695; *Kirby v. North British and Mercantile Insurance Co.*, (1896) 2 Q. B. 99; 65 L. J. Q. B. 527.

Copies of evidence.

Appeal books are not required in County Court appeals, and the respondent must obtain his own copy of the evidence.

The fees to be paid for copies of evidence taken in the County Courts are fixed by Order in Council of June 30th, 1896:

(1) For single copies five cents per folio.

(2) For copies required for the Judges under the rules made, or to be made, in that behalf, and to be furnished at the expense of the parties, and for one copy for the party desiring to move thereon, six cents per folio of one copy for all copies required of any one transcription of shorthand notes, not exceeding five altogether.

(3) For any additional copies made for the parties one and one-half cent per folio for each copy.

Notice of hearing.

No other notice of the appeal than that mentioned in Rule 796 is necessary. A form of the notice commonly given may be had by combining Forms 68 and 69 in the Appendix to the Consolidated Rules and adapting it to an appeal to a Divisional Court. The reasons of appeal are to be served with notice of hearing. There are no reasons against appeal to be served in County Court appeals.

The provisions of the Rules as to setting down appeals and giving notice of hearing are directory, and compliance with them is not a condition precedent to the right to appeal, or to the jurisdiction of the Court to hear the appeal: *In re Carter v. Smith*, 4 E. & B. 696; 24 L. J. Q. B. 141; *In re Hacking v. Lee*, 2 E. & E. 906; 29 L. J. Q. B. 204. Where the appellant has done all he can to comply with the Rules the appeal will not be struck out: *Francis v. Dowdeswell*, L. R. 9 C. P. 423. And where the provisions are for the benefit of the respondent, they may be waived: *Park Gate Iron Co. v. Coates*, L. R. 5 C. P. 634; *Ward v.*

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Raw, L. R. 15 Eq. 83. But the appearance of counsel to object to the hearing of the appeal is not a waiver of an objection to the notice of appeal: *Regina v Court of Revision of Cornwall*, 25 U. C. R. 286.

Where the appellant is in default the respondent is entitled to have the appeal struck off the list: *Francis v. Dowdeswell*, *supra*; also where an appeal does not lie. A substantive motion for that purpose may be made: *O'Donnell v. Guinane*, 28 O. R. 389; and that is the proper course: *Wansley v. Smallwood*, 10 P. R. 233.

The order of the Divisional Court is enforced in the Court below, and the statute also directs that the costs awarded shall be certified to the County Court, and form part of the judgment there: see *Lowson v. Canada Farmers' Mutual Insurance Co.*, 8 A. R. 613.

In County Court appeals, the rule that a successful appellant should have his costs of appeal, is seldom departed from: *Mills v. Hamilton Street R. W. Co.*, 17 P. R. 74.

Where the judgment of a County Court is set aside for want of jurisdiction, the Divisional Court does not dismiss the action, but leaves the case where it was before the County Court under- took to try it. The County Court then has jurisdiction over the costs of the action, and the Divisional Court has not: *Sherk v. Evans*, 22 A. R. 242. But where an appeal is struck out on the ground that there is no jurisdiction to hear it, the Divisional Court may award costs: *Teskey v. Neil*, 15 P. R. 244; *Sato v. Hubbard*, 6 A. R. 546.

RULES OF LAW.

58. The several rules of law enacted and declared by The Judicature Act shall be in force and receive effect in all County Courts in Ontario, so far as the matters to which such rules relate shall be respectively cognizable by such Courts. R. S. O. 1887, c. 47, s. 53.

This section does not alter the jurisdiction of the County Courts, nor allow them to entertain any causes of action otherwise beyond their jurisdiction. See *Re McGugan v. McGugan*, 21 O. R. 289; *Foster v. Reeves*, (1892) 2 Q. B. 255.

RULES OF COURT.

59. The Judges of the Supreme Court and of the High Court respectively, shall have the same authority to make

Judges of
Supreme
Court and

of High Court may make rules Rules of Court with respect to the County Courts as by sections 122 and 124 of The Judicature Act they have with respect to the High Court; and the Judges authorized, as mentioned in section 125 of that Act, shall, with respect to the County Courts, have the like authority. R. S. O. 1887, c. 47, s. 54.

Rule 1216 of The Consolidated Rules, 1897, provides that those rules shall apply to actions in the County Courts.

The Consolidated Rules were prepared by commissioners appointed under 58 V. c. 13, s. 42, and were approved by the Lieutenant-Governor in Council under that statute. See also R. S. O. c. 51, s. 129.

TARIFF OF COSTS.

Tariff of costs for counsel and solicitors.

60 —(1) The Board of County Judges appointed under section 305 or 306 of The Division Courts Act, or the majority of them, may frame a tariff of costs to be allowed to solicitors and counsel in respect of actions in the County Courts, and may, from time to time, alter and amend the same.

(2) The Board, or any three of them, shall certify to the Judges authorized to make Rules under sections 122, 124 or 125 of The Judicature Act, any tariff so framed, or any alteration thereof; and the Judges may approve, disallow or amend such tariff or alterations; and such tariff or alterations approved by the Judges shall have the same force and effect as if made under the said Act by the Judges so approving of the same. R. S. O. 1887, c. 47, s. 55.

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